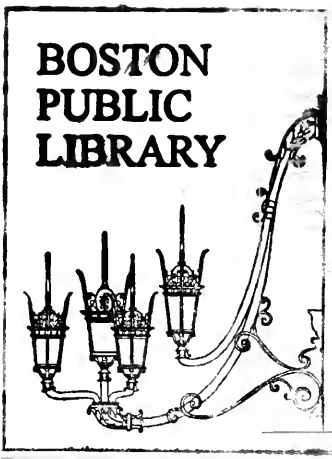

ADOPTION 2002:

THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE

GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN

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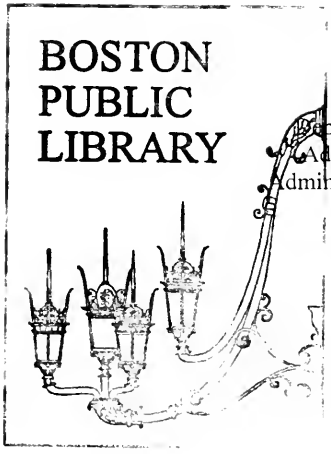

Department of Health and Human Services
Administration for Children and Families
Administration on Children, Youth and Families
Children's Bureau

June, 1999

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DEPARTMENT OF HEALTH & HUMAN SERVICES

PREFACE

Administration for Children and Families
Administration on Children, Youth and Families
330 C Street, S.W.
Washington, D.C. 20447

JUN 30 1999

Dear Colleagues,

We are pleased to share with you a new technical assistance tool, entitled ***Guidelines for Public Policy and State Legislation Governing Permanence for Children***. Building upon the Children's Bureau's tradition of issuing guidelines and model legislation which predates Sheridan's 1975 publication of "Model Acts for Family Courts and State-Local Children's Programs," the ***Guidelines*** are being disseminated nationally to child welfare agencies, State courts, and national organizations with a particular interest in children and families.

This document was developed by a cross-disciplinary group of experts in child welfare, comprised of administrators, lawyers, judges, advocates, and front-line workers. Deliberating for more than a year, the work group developed these ***Guidelines*** which reflect their best thinking about child welfare policy frameworks and what ought to be.

This has been a period of remarkable legislative and programmatic reform in child welfare services. The Adoption and Safe Families Act enacted in 1997 provides a new legislative framework which focuses on safety, permanency, and timeliness of decision-making for children and families. The enactment of this legislation has reinforced reform activities occurring across the country.

We hope these ***Guidelines*** will be used to examine State and local processes and generate discussions about current and future directions. The release of the ***Guidelines*** creates an opportunity to convene key stakeholders to discuss better approaches to achieve permanency through reunification, adoption, and other permanency arrangements.

While we have made progress in achieving the goals that we have for children and families, there is much to be done. No single tool or strategy will get us there. Agencies continue to struggle with policy, capacity, staffing and caseload issues. This document will not resolve these problems, but will highlight the relationship between policy and these critical implementation issues. We hope it can also move us closer to solutions.

Sincerely,

Carol W. Williams, D.S.W.
Associate Commissioner
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Children's Bureau

GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCY FOR CHILDREN

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ADOPTION 2002:
THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE

GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN

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CHAPTER I: INTRODUCTION

PURPOSE OF GUIDELINES

The **Guidelines for Public Policy and State Legislation Governing Permanence for Children** were developed as one of several action steps undertaken by the Federal government in response to *Adoption 2002*, President Clinton's Initiative on Adoption and Foster Care. It is a technical assistance document designed to help States review their own laws and develop statutes and policies that reflect the best practices in child welfare today. The **Guidelines** are intended to assist the States as they focus on critical issues affecting child welfare practice and the courts.

As the **Guidelines** were being developed, Congress passed the Adoption and Safe Families Act of 1997 (ASFA), the first major reform of Federal child welfare policy since 1980. Enactment of this new law and the need for requisite changes in State laws and policy will continue to generate significant discussions among policy makers, service providers, child welfare experts, and judicial officers. These **Guidelines** are designed to support such discussions by highlighting key issues to explore permanency for children; they can be used to identify specific questions that need to be addressed and to facilitate clear policy choices to help achieve permanence for children.

The **Guidelines** recognize that, apart from Federal funding of public child welfare, the child protection and foster care system in the United States is primarily governed by State law and the way that State law is implemented. These **Guidelines** draw upon the best practices among the States, and are meant to help States evaluate and modernize their laws that affect children and families who are having difficulties that require intervention by the child welfare system. The **Guidelines** particularly focus on the courts and legal processes involved in decisions affecting children and families; they were written for a broad audience of stakeholders in the public policy arena, including State legislators and their staffs, judges, public child welfare officials, and other State-level policymakers and program managers.

ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE

America's foster children spend far too long waiting—deprived of the permanent and stable homes necessary for their healthy development. In an Executive Memorandum of December 14, 1996, President Clinton said:

> "I am committed to giving the children waiting in our Nation's foster care system what every child in America deserves—loving parents and a healthy, stable home. The goal for every child in our Nation's public welfare system is permanence in a safe and stable home, whether it be returning home, adoption, legal guardianship, or another permanent

placement. While the great majority of children in foster care will return home, for about one in five, returning home is not an option, and they will need another home, one that is caring and safe. These children wait far too long—typically over 3 years, but for many children much longer—to be placed in permanent homes. Each year State child welfare agencies secure homes for less than one-third of the children whose goal is adoption or an alternate permanent plan. I know we can do better."

President Clinton directed Secretary of Health and Human Services, Donna Shalala, to conduct wide consultations and make specific recommendations for strategies to move children more quickly from foster care to permanent homes and to double, over the next five years, the annual number of children who are adopted or permanently placed. On February 14, 1997, Secretary Shalala issued ***Adoption 2002*: A Response to the Presidential Executive Memorandum on Adoption**, as a blueprint for bipartisan Federal leadership in adoption and other permanent placements for children in the public child welfare system. Several important assumptions are articulated in the ***Adoption 2002*** report.

1. Every child deserves a safe and permanent family.
2. Children's health and safety is a paramount concern that must guide all child welfare services.
3. Children deserve prompt and timely decision-making as to who their permanent caregivers will be.
4. Permanency planning begins when a child enters foster care; foster care is a temporary setting.
5. Adoption is one of the pathways to a permanent family.
6. Adoptive families require supports after the child's adoption is legalized.
7. The diversity and strengths of all communities must be tapped.
8. Quality services must be provided as quickly as possible to enable families in crisis to address problems.

Among the Proposed Action Steps recommended in ***Adoption 2002*** is that of developing model guidelines for State legislation to advance the goal of giving every child in our nation's public child welfare system a safe and permanent home. To initiate this project, the Children's Bureau within the Department of Health and Human Services, together with the Department of Justice, convened an interdisciplinary Expert Work Group to address these issues.

The Children's Bureau has a history of developing model guidelines for consideration by the States. In 1922 and again in 1954, the Children's Bureau developed guidance documents specifically designed to help States improve their specialized courts dealing with children. Once more, in 1965-66, the Children's Bureau tapped the best national expertise available and produced *Standards for Juvenile and Family Courts*, a document for family courts that reflected a general consensus of the thinking and experience of that interdisciplinary group. This **Guidelines** project builds upon that tradition of Federal leadership to provide guidance for the States.

To assist in this process, recognized leaders in the field of child welfare and related areas were invited to participate in the interdisciplinary Expert Work Group selected to represent a variety of opinions and approaches. The group met four times between October 1997 and June 1998, giving content and direction to the drafters of the **Guidelines**, Don Duquette and Mark Hardin, on the topics to be covered and the specific issues to be addressed. As a consensus report, this document does not represent the view of every participant on every issue but, to the extent possible, significant differences of opinion among the group are discussed. Child welfare involves many controversial issues. Disagreements among group members are reflected in the text of the **Guidelines** itself with the hope that explication of the different views will be helpful to the States.

In presenting the full scope of our collective "best thinking" on current issues in child welfare law and practice, including the substantive differences among the views held by experts in the field, the **Guidelines** should be seen almost literally as "guideposts," identifying ways to improve the interface between State child welfare agencies and the courts. Yet, clearly, these **Guidelines** are not the panacea for a public child welfare system in crisis. Along with adequate resources for agencies and courts, a statutory and policy framework is a necessary, but not sufficient, element of a successful formula to reform child welfare. America's children deserve a child welfare system that includes a stable and sophisticated professional workforce, an effective service delivery strategy, a caring and supportive community, adequate resources for social services and courts, *and* a sound statutory framework that governs State intervention in families unable to care for their children. Passing laws will not, by itself, cure what ails America's foster care system, but statutes that reflect the best practices among the States today are an essential element of that reform effort.

PERMANENCY FOR CHILDREN

"Permanency" is a term of art used throughout the **Guidelines** and is defined here. "Permanency" means that a child has a safe, stable, custodial environment in which to grow up, and a life-long relationship with a nurturing caregiver. The concept of permanency has assumed a central place in American child welfare law and policy because permanency establishes the foundation for a child's healthy development. The basic needs of children include safety and protection; a sense of identity; validation of themselves as important and valued persons; stability and continuity of caregivers; an opportunity to learn and grow cognitively, physically and emotionally; and a protected custodial environment that is legally secure. *Permanency,* as epitomized by a safe, stable relationship with a nurturing caregiver, allows these basic needs to be met.

Permanency can be achieved in a number of ways. A child can be protected within his or her own home, or through reunification with his rehabilitated parents. Extended family can provide short or long term legally sanctioned care for the youngster through adoption or guardianship. Or, alternatively, a child can be adopted by non-relatives. Adoption is generally considered the optimal form of permanence when the biological parents are unable to provide a safe, stable, and nurturing home. However achieved, permanency is a cornerstone of American child welfare policy.

LEGISLATIVE SUPPORTS FOR ACHIEVING PERMANENCY

The Federal framework setting direction and parameters for the operation of State and local child welfare agencies and courts was established almost 20 years ago with passage of Public Law (P.L.) 96-272, the Adoption Assistance and Child Welfare Act of 1980. This was the first Federal statute to discourage excessive reliance on foster care placement and promote greater use of services to assist and rehabilitate families, preventing out of home placements. It introduced the concept of permanency planning and incorporated specified time frames for decision making for children and families. These were significant changes in the legislative history of child welfare services, but, as new and more complex social problems emerged and foster care caseloads increased, additional programs and alternative approaches were required. Consequently, other legislative initiatives to support or promote permanency were introduced. These included the Family Preservation and Family Support Services Program (FPFS) established in 1993 and amended in 1997, the Multiethnic Placement Act of 1994 (MEPA) with its 1996 Interethnic Placement Provisions (IEP), and the Adoption and Safe Families Act (ASFA) enacted in November of 1997.

The legislation that established the Family Preservation and Family Support Services Program (P.L. 103-66) focused primarily on the front-end of the child welfare system by providing additional funding for preventive services and crisis services for children and families at risk. Implementation required active involvement of a broad community of stakeholders to focus on needs and services for children and families. The law also created the Court Improvement Program, and provided resources to State courts for the first time, to ensure that courts were responding to the needs of children in foster care. The Court Improvement Program required State Courts to conduct systematic needs assessments and plan necessary reforms. In effect, this legislation highlighted family services and prevention as a national priority, and provided opportunities for State agencies and Courts to plan child welfare reforms.

In response to major concerns about the extended length of stay and poor outcomes for minority children and the prevalence of racial preference in placement, the Congress enacted the Multiethnic Placement Act (MEPA), (P.L. 103-382) and the Interethnic Placement Provisions (IEP), (P.L. 104-188). Enacted in 1994, MEPA outlawed discriminatory practices, and, in 1996, the IEP clarified the original legislation and created sanctions for States and agencies which fail to comply with the Act. MEPA forbids the delay or denial of a foster or adoptive placement solely on the basis of the race, color or national origin of the prospective foster parent, adoptive parent or the child involved. It also compels States to make diligent efforts to recruit and retain foster and adoptive families that reflect the racial and ethnic diversity of the children for whom homes are needed. With the Interethnic Placement Provisions, Congress subsequently clarified MEPA and repealed that section of the law containing "permissible consideration" language which could have been used to obfuscate the law's intent. The amendment also dictates a penalty structure and corrective action planning for any State or private agency which receives Federal funds that violates the amended section of the Act. These two statutes are noteworthy for child welfare because they not only required changes in laws and policy; they also required changes in

child welfare practice to facilitate more timely placement of children into foster and adoptive homes.

However, it is the recently authorized Adoption and Safe Families Act of 1997 (P.L. 105-89), enacted as an amendment to titles IV-B and IV-E, which most comprehensively addresses critical permanency issues in child welfare and the law. The law was a bipartisan action to ensure that children's safety would be the paramount concern of all child welfare decision-making and to promote the adoption of children who cannot return safely to their own homes. The law has two overarching goals: the first is to move children who are stranded in the child welfare system with no place to go; the second is to change the experience of children who are entering the system today. Five key principles guide the implementation of the law. Evolving from some of the same important assumptions underlying the *Adoption 2002* report, these key principles were developed in consultation with the broad community of practitioners, administrators, child advocates, attorneys, judges, and other professionals working with families through public and private agencies and State and local courts. All of the following principles are embodied in specific provisions mandated by ASFA:

Safety is the paramount concern that must guide all child welfare services. To emphasize the importance of the safety principle, the new law:

- States explicitly that child safety is the paramount consideration in decision-making regarding service provision, placement, and permanency planning for children;
- Clarifies the reasonable efforts requirements by reaffirming the importance of reasonable efforts, yet identifying those circumstances in which States are *not required* to make reasonable efforts to keep the child with the parents (i.e., cases in which a parent has been convicted of murdering another child, has had rights to another child involuntarily terminated, has committed a felony assault resulting in serious bodily injury to the child or another child of the parent, or when a court has found that the child has been subjected to aggravated circumstances such as abandonment, torture, or chronic abuse); and
- Requires criminal record checks on the backgrounds of prospective foster and adoptive parents.

Foster care is temporary. To ensure that the system respects a child's developmental needs and sense of time, the law reaffirms reunification as a viable option for children whose families can provide them with a safe, nurturing environment, strongly promotes the timely adoption of children who cannot return safely to their own homes, and radically changes the time frames for decision-making for children. To ensure that children can move out of foster care and grow up in safe, permanent homes, ASFA:

- Reaffirms reasonable efforts to reunify families except under specified circumstances;
- Establishes a new reasonable efforts requirement for permanency, so that efforts will be made to find families for children who are legally free and waiting for permanent placement;
- Requires States to hold the child's first permanency hearing within 12 months (rather than 18 months);

- Requires States to initiate or join termination of parental rights (TPR) proceedings for children who have been in care for 15 out of the last 22 months (*unless* the child is placed safely with relatives; there is a compelling reason why TPR is not in the child's best interest; or, when the family has not received the services that were part of the case plan); and
- Establishes adoption incentive payments for States to increase the number of children who are adopted, leading to a doubling of the annual number of children adopted by the year 2002;
- Extends health coverage to children with medical needs who have an adoption assistance agreement; and
- Allows adopted children to maintain title IV-E eligibility following the death of their adoptive parents or a disruption in the prior adoption.

Permanency planning efforts should begin as soon as a child enters care. The law heightens the importance of providing quality services as quickly as possible to enable families in crisis to address their problems quickly. The law:

- Reauthorizes the Family Preservation and Support Program for three years and renames it the Safe and Stable Families Program;
- Expands the use of program dollars to include time-limited reunification services for the 15 months after children enter care; and
- Authorizes pre- and post-adoption services to support adoptive families and supports activities to expedite the adoption process.

The child welfare system must focus on results and accountability. The law indicates that meeting procedural safeguards is no longer sufficient and that child welfare services should lead to positive results. It requires:

- Development of child welfare outcomes and performance measures, and other tools for focusing on results;
- Development of an annual report on State performance in child welfare including specific indicators to assess State achievement; and
- Examination of the feasibility of a performance-based incentive system for child welfare including a progress report and final recommendations to Congress.

Innovative approaches are needed to achieve the goals of safety, permanency, and well-being. To allow for serious consideration of new ways to serve children and families, the law expands Federal authority to support projects for the examination of issues, and the demonstration and evaluation of program improvements related to child welfare. Specifically, the law:

- Expands the Department of Health and Human Services' child welfare demonstration authority by allowing for award of up to ten grants per year for waiver of certain provisions of titles IV-B and IV-E;
- Authorizes the Department to conduct two major policy studies: the first examines Kinship Care; the second focuses on the relationship between substance abuse and child welfare; and,

- Authorizes the General Accounting Office (GAO) to examine geographic barriers to the adoptive placement of children.

With these principles and provisions in place, enactment of AFSA has provided State and Federal officials with a unique opportunity to reform the child welfare system to make the system more responsive to the multiple, and often complex, needs of children and families. The law reaffirms the need to forge linkages between the child welfare system and other systems of support for families, and, as indicated in these **Guidelines**, between the child welfare system and the courts. The law also gives renewed impetus to dismantle the myriad barriers that still exist between children waiting in foster care and permanency.

An ongoing commitment to strengthening all aspects of the child welfare system, effective use of these **Guidelines**, and timely implementation of the new law will make a meaningful difference in the lives of children in foster care, and in the lives of children who must come into contact with the child welfare system in the future.

THROUGH THE EYES OF THE CHILD

Half a million American children are in foster care, remaining in a psychological and physical limbo far longer than they should. These are real children with their own stories and personal dilemmas. It is easy to reduce their anguish to mere statistics and legal technicalities. It is easy to lose focus on the complexity of their lives. Yet, it is the individual boy or girl that constitutes the heart and soul of this document and who motivates our work on it. Here are some examples of children whose lives will be improved if permanency can be achieved for each of them.

In 1996 *Brendan R.,* age four, was found dirty, hungry and alone. His mother, addicted to cocaine and alcohol, was homeless and unemployed. Brendan was taken from her and spent 13 months in foster care. Motivated by the desire to regain custody of her son and assisted by a persistent and hopeful social work team, Brendan's mother overcame her addictions, fulfilled the requirements of court orders and her Parent/Agency Agreement, and found full-time employment. In slightly over one year, Brendan returned to his mother's custody, having been in the same foster home the entire time. Brendan represents a foster care success, but unfortunately, Brendan's foster care experience is not typical. Of the nearly half million children in foster care, most, approximately 65 percent, will return to their birth families but, unlike Brendan, the average length of stay in foster care is three years and the average foster child experiences 3.2 different foster placements. These **Guidelines** try to reflect a child's sense of time and the need to act and decide quickly. The **Guidelines** propose a focused and disciplined intervention in a family monitored by regular court reviews so that more children and parents can benefit from foster care as did Brendan and his mother.

Louis was also four when placed in foster care due to extreme abuse and neglect. Unfortunately, his is a history of trauma and loss. After ten years in a series of foster homes, all he wants is a family who will laugh at his jokes, take him for Chinese food (his favorite), and

keep him for life—a family who will be there long after he turns 18. Louis said recently, "God, if you're listening, I really want a family." The State agency and court recently gave up hope of finding an adoptive family for Louis and changed his case plan to long-term foster care. Louis' dream of a forever family may never be realized.

"The foster care system, intended to provide temporary care, has become home for far too many neglected and abused children." (Kate Welty, *Achieving Permanence for Every Child: A Guide for Limiting the Use of Long-Term Foster Care as a Permanent Plan,* North American Council on Adoptable Children, 1997, p.1.) Approximately 14,000 foster children per year age out of foster care without ever returning to their birth families or being placed permanently in homes of their own. *(AFCARS,* October 1, 1977-March 31, 1998 reporting period.) Effective utilization of these **Guidelines** may reduce that number dramatically.

Tiffany and Victoria S. represent two of the approximately 20,000 foster children adopted each year. It took far too long for them to be adopted. Tiffany was 5 when placed in foster care and 12 when she was adopted (7 years later); Victoria was 3 when placed in foster care and 8 when she was adopted (5 years later). Their adoptive mother said, "Tiffany told us that she'd be sitting on the couch in one of her foster homes, watching TV and the social worker would come get her. She never knew when she came to a place whether it would be home for a month or a year." Tiffany says, "It was hard to be in other homes and then think, 'Is this going to be it, or am I going to have to move again?' I'm very relieved to be adopted, and it's just good to know that I am not going to have to worry about one day this social worker being here and all of a sudden saying, 'Well, Tiffany, I'm sorry but you have to leave.' " (Kellogg Families for Kids, 1997 Progress Report, p.2.)

Miranda was 2 months old when child protective services discovered her living with a convicted drug dealer, who allegedly received the child in settlement of a drug debt. Miranda's mother had relinquished four other children to relatives' custody. Both Miranda and her 3 year old brother were born cocaine exposed. Miranda's lawyers, working closely with the public agency, moved aggressively to find a legally secure and permanent placement. A maternal aunt and uncle already had physical custody of Miranda's 3 year old brother and were willing to take Miranda permanently, except they could not afford expenses for two children. The child's lawyers found that the aunt and uncle were legally entitled to adoption subsidies for both children and, with the aunt and uncle's permission, took the necessary legal steps to achieve termination of the mother's parental rights and finalize the adoption and to secure adoption subsidies for both children. Thanks to aggressive legal representation of the child, as recommended in the **Guidelines**, Miranda spent three weeks in foster care before being placed with her aunt and uncle. Her adoption was final within six months of the case coming to the attention of the court.

Casey was starved and neglected during the first three months of his life. He was placed with a foster-adopt family, in a concurrent planning process. Reunification with the birth parents and long term permanency planning for Casey occurred simultaneously. The foster parents loved and cared for him while trying to help Casey reunite with his birth parents by modeling good parenting for them. After a year of intense services, Casey's parents decided that they could not

parent him and voluntarily relinquished custody to the foster parents who then adopted him. Casey is now 11 and his experience demonstrates several recommendations in the **Guidelines**: remove the emotional uncertainty from the child as much as possible, give birth parents a fair and reasonable opportunity to become adequate parents, provide long term permanence for the child, and settle disputes voluntarily and non-adversarially as much as possible.

Tiffany, now 14, is Casey's adoptive sister, who was first placed with her adopting family on a concurrent planning, foster-adoptive basis when she was 11. Now adopted, Tiffany stays in touch with her grandmother and cousins in her extended birth family. Tiffany is an example of a child benefiting from a fairly new legal option for children recommended by these **Guidelines**—adoption with contact. Because of the voluntary arrangements between her birth and adoptive families, Tiffany is experiencing something previously unknown in her life—commitment and continuity. "I have my own room and have been going to the same school for three years—the longest I've ever gone to one school," says Tiffany. "I have friends that I've known for years. All those things are nice. . .but what's important is that every day when I go home, I know I will be hugged and loved and supported in whatever I do. I know they'll never leave me." (Kellogg Families for Kids, 1997 Progress Report, p. 8.)

Brothers *Abe* and *Josh* lived with their maternal grandparents since they were babies. Their parents were very young and the relationship never really worked out. Their grandmother says, "We asked the father if he would be willing to relinquish parental rights. We told him that he had a right to his children, that we weren't taking them away from him, but that we would raise them for him. He agreed right away, but for my daughter it took a little longer. In our family my daughter is 'their mother' and they call me 'Mom.'" Josh, age 13, says, "Things are all right with my mother but I don't really hang around with her. I just know her as my sister really." Many communities and cultural groups and individuals are not comfortable with termination of parental rights and formal adoption when it happens within the extended family. Some say, "Why should I adopt him; he is already my grandson (or nephew or brother)?" Permanent guardianship, a new legal status set out in the **Guidelines**, provides legal security and stability while maintaining selected legal ties, including inheritance rights, to the birth parents. For some children this status of permanent guardianship will provide just the appropriate level of security and connectedness.

THE CHALLENGE OF DIVERSITY

When one looks in the face of an American foster child, one is most likely to see a child of color. While they comprise only 35 percent of the general population, children of color make up over 64 percent of the children in foster care, according to the most recent data available. (USDHHS, Children's Bureau, *National Study of Protective, Preventive and Reunification Services Delivered to Children and Their Families*, 1997.) When a family is reported for suspected child abuse and neglect, minority children, particularly African-American children, are more likely than white children to be placed in foster care rather than receive in-home services—even when the children share the same problems and characteristics. (Id.) African-American and Latino children tend to remain in temporary foster care twice as long as white children and, once legally free for adoption, wait for adoption longer than white children do. (McKenzie, *Adoption*

of Children with Special Needs, *The Future of Children*, Spring 1993, p. 62.) Similarly, despite the Indian Child Welfare Act, Native American children also are significantly overrepresented in the foster care population.

Although a disproportionate number of minority children enter and remain in foster case, recent reports published by the Children's Bureau clearly indicate that the actual incidence of child abuse or neglect does not differ among different racial or ethnic groups. (Sedlak, A.J., and Broadhurst, D.C., *The Third National Incidence Study of Child Abuse and Neglect*, Washington, DC, 1996, pp. 7-22.) Therefore, the overrepresentation of children of color who have been placed in foster care because of suspected child abuse and neglect is a particularly troubling phenomenon.

Much like race, ethnicity, and culture, socio-economic status also affects entry into foster care. Close to 60 percent of foster children come from families receiving government support. More than half (at least 52 percent) of the children in foster care come from families that are title IV-E eligible (i.e., at the lowest end of the family income scale). (USDHHS, Children's Bureau, *National Study of Protective, Preventive and Reunification Services Delivered to Children and Their Families*, 1997, pp. 6-7.) When viewed cumulatively, statistics such as these suggest that a complex set of service delivery dynamics is at work which profoundly affects the experiences of minorities and low-income families in the public child welfare system. But even as we develop increased levels of cultural competency among child welfare and court staff, and risk assessment processes to account for cultural differences, and increase our understanding of the complex problems related to poverty and family stress, we cannot adequately explain the overrepresentation of poor and minority children in care. Consequently, the challenge posed by diversity in the public child welfare arena remains as a critical issue, which has yet to be addressed.

OUR COLLECTIVE CHALLENGE

No single group or element of our community has the ability or the responsibility to improve the foster care system on its own. This fact presents a unique and difficult challenge to the country's leadership. *All* the Nation's leaders collectively share equal levels of responsibility for America's children, whether their sphere of operation is in local communities or in business, the professions, science, education, social services, or any other type of work. The challenges facing America's child welfare system are many and the keys to successful reform must come from many quarters. Child welfare reform must be broad-based and interdisciplinary. The potential for achieving meaningful child welfare reform lies in getting all components of our communities to work together to implement specific improvements.

Read these **Guidelines** as a whole. They attempt to strike a delicate balance between the child's urgent need for safety and permanency, and agency and court efforts to help parents overcome the problems that result in child maltreatment or make their home unsafe for their child. We hope these will be helpful to State legislators, policy makers, administrators, and advocates interested in helping children achieve permanence.

CHAPTER II: OPTIONS FOR LEGAL PERMANENCY

INTRODUCTION

This chapter is intended to identify options for legal permanency which States already recognize, or can create, to better serve children in foster care. The legal processes governing parental rehabilitation and grounds for termination of parental rights are addressed in succeeding chapters (See Chapter III, Reasonable Efforts; Chapter IV, Court Process; and Chapter VI, Termination of Parental Rights). The law should provide legally secure alternative permanent placements for children who cannot be raised within their family of origin. The emphasis on legally secure permanent placement is meant to provide the child psychological stability and a sense of belonging, and limit the likelihood of future disruption of the parent/child relationship. All State laws authorize adoption of the child, but traditional adoption does not meet the needs of all children in public foster care. Legal options for permanent and legally secure placement should be broad enough to serve the needs of all children in care who are not able to return to their home of origin and could include adoption, permanent guardianship, and stand-by guardianship.

For children who cannot be reared by one or both of their birth parents, adoption, by relatives or non-relatives, is the preferred option for a permanent legal placement. By providing children with a new family, adoption is most likely to ensure protection, stability, nurturing, and familial relationships that will last throughout their lives. Alternatives to adoption discussed here, such as permanent guardianship, should be used only when adoption has been thoroughly explored and found inappropriate for the needs of a particular child.

These options for permanency reflect the same priority preference for permanent placement of foster children with relatives that is reflected throughout these **Guidelines**: (1) safe reunification with the biological parents or a suitable member of the family of origin; (2) adoption; and (3) permanent guardianship. Yet this hierarchy of preference is not inflexible and requires individualized judgements based on the circumstances of each individual child. For example, if a child is psychologically attached to a relative and has been living for an extended time with that relative but the relative cannot or will not adopt, a permanent guardianship with that relative may be preferable to moving the child to a recruited adoptive family. On the other hand, a relative with no established relationship with the child who offers to become a child's caretaker late in the court process may not be as appropriate for adoption as foster parents who have cared for the child for some time and who wish to adopt.

GUIDELINES AND COMMENTARY

GENERAL GUIDELINES

1. *Principles.* **We recommend that State law reflect the following principles:**

   a. **The most preferred permanent placement for a child is safe and permanent reunification with the birth parent or extended family of origin.**
   b. **For children who cannot be reared by their birth parents or within their extended family of origin, adoption is the preferred permanent placement.**
   c. **If adoption is not appropriate for a child unable to return home safely, State law should establish other legally sanctioned permanent placements including permanent guardianships.**
   d. **A permanent placement includes the following characteristics:**
      i. **It is legally intended to be permanent—both to last throughout the child's minority and to establish family relationships that will last for the child's lifetime.**
      ii. **It is legally secure from modification.**
      iii. **The permanent caregiver has the same legal responsibility for the child as a birth parent.**
      iv. **The State no longer has legal custody of the child and the permanent caregiver is not subject to continuing State supervision.**
   e. **State law should establish several legal options for permanent placement, including legal guardianship or planned permanent living arrangements. In addition, State law should permit agreed upon legally protected contacts between the child and members of the child's birth family or other significant persons, so long as the permanent placement option is based on the child's best interests and ensures the stability and security of the placement.**
   f. **A decision to place a child permanently should comply with the letter and spirit of the Multiethnic Placement Act of 1994 as amended (42 USC 5115a *et seq.*) and with the Indian Child Welfare Act (ICWA) (25 USC 1901 *et. seq.*).**
   g. **State law should authorize the court that handled the child protection action to approve an option for permanent placement and to exercise jurisdiction over any post placement matters.**

Commentary

Guidelines 1a-c above reflect the basic goals of existing Federal and State law concerning permanent placements of children. Public child welfare agencies are expected to help parents provide a safe home for children who have been, or are at risk of being, abused and neglected. If children must be separated from their parents for safety reasons, agencies are similarly expected to work for the child's return, if return is a realistic possibility. See Chapter III, Reasonable Efforts.

If, however, an agency has made reasonable but unsuccessful efforts to reunify the child with his or her family of origin, or there is legal justification not to make such efforts, the agency must make reasonable efforts to arrange a new permanent home for the child in a timely manner. [See 42 U.S.C. §671(a)(15).] Federal and State law emphasize the vital importance of stability and predictability in children's lives. Guideline 1b emphasizes the strong preference for adoption, a traditional status in which the child is psychologically and legally absorbed into the adoptive family in a way not achieved by the other permanency options. When permanent placement with a relative is proper for a child, that placement is best formalized through an adoption. Where adoption is not appropriate for a child, however, Guideline 1c recognizes the importance of some other legally permanent status for the child.

Guideline 1d describes some of the necessary legal characteristics of a permanent placement. When a child is placed in a new permanent home, the child's new caregivers should be legally protected in their new role. At the same time, the new caregivers must make a permanent commitment to the child and must take on full legal responsibility for the child. The new caregivers should be legally protected in two basic ways. First, they—not the government—should have legal authority to direct the child's upbringing. Second, they should have no reason for concern that either the government or the birth parents might later remove the child from their home. Of course, all caregivers are subject to existing criminal and civil child abuse and neglect laws.

Although adoption commonly transfers all parental rights and responsibilities to the adoptive parents and ends all ties to the birth family, Guideline 1e recognizes that, in some cases, children may benefit from maintaining some contact with birth parents, extended family, or other significant persons in their lives. No single type of legal arrangement can meet the needs of every child needing a new permanent home. See further discussion of adoption with contact under Guideline 3 below and discussion of other permanency options including permanent guardianship under Guidelines 4-6 below.

Guideline 1f assumes full compliance with the Multiethnic Placement Act as amended and other Federal law which prohibits any delay or denial of adoption or foster care placement based on the child's or the prospective parent's race, color, or national origin. However, the law also requires the diligent recruitment of potential foster and adoptive families who reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed. [See 42 U.S.C. 5115a and 42 U.S.C. 622(b)(9); J.H. Hollinger, Guide to MEPA-IEP (ABA Center on Children and the Law), 1998.]

Guideline 1f also recognizes that the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, allows tribal courts to exercise exclusive jurisdiction over some Indian children alleged to be abused or neglected, and permits the tribe to appear as a party in a child protection action in State court. In making out of home placements, the ICWA requires a State court to consider an Indian child's tribal heritage and the political sovereignty of the tribe and its members. ICWA directs a court to place an Indian child, in descending order of preference, with:

a. a member of the child's extended family,

b. a foster home licensed, approved or specified by the child's tribe,
c. an Indian foster family licensed or approved by a non-Indian licensing authority,
d. an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

[See 25 USC 1901 *et seq.*; J.H. Hollinger, Ch.15 *Adoption Law and Practice* (1989-99).]

GUIDELINES FOR ADOPTION

2. *Adoption Preferred.* **We recommend that State law reflect a preference for adoption. Adoption, the legal and permanent transfer of all parental rights and responsibilities to the adoptive parents, is the placement option that offers the greatest legal protection to a child because the child becomes, in all respects, the legal child of the adoptive parents.**

Commentary

Adoption remains the placement of choice when a child cannot be returned to his or her birth family, because it gives the child a new, permanent, legal family with the same legal standing and protection as a family created through birth. Adoption is the permanent transfer of all parental rights and responsibilities concerning a child to the adoptive parents. An adopted individual is entitled to inherit from and through the adoptive parents and is treated as the child of the adoptive parents for purposes of social security, insurance, retirement, pension, and all other public and private benefit programs. Conversely, adoptive parents acquire rights to inherit from and through the adopted child. Adoption thus provides, for the most part, the same autonomy, security and durability of family relationships that children experience in their families of birth. Children, adoptive parents, birth parents, and the general public also understand and are familiar with this type of legal relationship. Children may be adopted by relatives, step-parents, foster parents, or persons previously unrelated or unknown to them.

3. *Post Adoption Contact Agreement:* **We recommend that State law authorize a court terminating parental rights or granting adoption for a child in foster care to approve an agreement by the adoptive parent or parents to allow post-adoption contact between the child and a birth parent, sibling, grandparent, or other relative or individual who has a significant emotional tie to the child. State law should provide for the legal enforcement of an agreement for post-adoption contact, subject to the following:**

   a. **Adoption is irrevocable, even if the post-adoption contact agreement is violated, modified, or set aside.**
   b. **A birth parent's voluntary relinquishment of parental rights may not be set aside if a post-adoption contact agreement is violated, modified or set aside.**
   c. **The court may approve the post-adoption contact agreement only if the parties, including a child over the age of 12, agree and the court finds that the agreement is in the best interests of the child.**

d. **The court may approve post-adoption contact ranging from occasional exchanges of cards, photographs and information to regular personal visits in whatever level of detail the parties agree to and the court deems appropriate as supported by the record.**

e. **Any party to the post-adoption contact agreement may petition the court to modify the agreement, order a person to comply with the agreement, or to void the agreement.**

f. **The court may order compliance, modify, or void the contact agreement only if the parties agree or circumstances have changed and it is in the best interests of the child. The court may use its contempt power to enforce compliance as appropriate.**

Commentary

Without protective legislation, post-adoption contact is purely voluntary and rarely enforceable in court. Although a court might decide to exercise its equitable powers to enforce an informal agreement in extraordinary circumstances, another court might decide to set aside an adoption if it believes that ongoing contact with the birth family is inconsistent with the severance of all legal ties to the birth family, which is the traditional consequence of adoption. Despite these uncertainties, informal voluntary arrangements for post-adoption contact may be appropriate for some children, especially when adoptive and birth families already know each other and have a high degree of mutual trust. Legislation is needed, however, to protect the benefits of voluntary arrangements by specifically providing that the validity of a voluntary relinquishment, a judicial termination of parental rights, or a decree of adoption is not subject to challenge because of an agreement for post-adoption contact or because of any failure to comply with the agreement. See, for example, the Uniform Adoption Act (1994) § 3-707 (c) proposed to the States by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and approved by the American Bar Association. The UAA provision, 3-707 (c) or similar provisions have been enacted in 20 or more States. See, for example, Alaska, Maryland, Missouri, Ohio, and Tennessee.

In addition, State laws should authorize judicial approval and enforcement of agreements for post-adoption contact in appropriate circumstances. At least 13 States* have enacted "open" or "cooperative" adoption laws that provide some mechanism for approval and enforcement of post-adoption agreements. Most share two fundamental aspects—the parties must agree upon post-adoption contact, and failures in post-adoption contact will not invalidate the adoption or any relinquishments. While most States make such contact available to all adoptees e.g., Oregon, Or. Rev. Stat. §109.305 (1993); New Mexico, (N.M. Stat. Ann. 1978 ch. 32A, §5-35 (Michie 1978 & Supp. 1994)); Washington, (1986 Wash.Laws 26.33.295 (Supp. 1994)); Minnesota, (Minn. Stat. Ann. §259.58 (1997)); Montana, (Mont. Code Ann. §52-5-301 (1997)); West Virginia, (West Virginia Code 1966 ch. 48, art.4, §48-4-12 (1997)); and South Dakota (SD

* For contribution to this section, the Expert Work Group thanks fellow Work Group member Professor Joan Hollinger, University of California-Berkeley School of Law, for input and edits of the commentary, and also acknowledges the published work and comments of Professor Annette Ruth Appell, Boyd School of Law, UNLV.

Cod. Laws 25-6-17 (1997)), some State laws limit such post-adoption contact to children who have been in foster care. See, for instance, Nebraska Rev. Stat. §§43-162 to 165; and New York, N.Y. Soc. Serv. Law §383-c (McKinney 1992 & Supp.). California limits post-adoption contact to children adopted by relatives (Ann. Cal. Fam. Code §8714.7) while Indiana limits it to children 2 and over (Burns Ind. Code Ann §31-3-13 (1994). Other States simply acknowledge that post adoption contact can occur (e.g., Ohio) or prohibit the court from forbidding such contact (e.g., Missouri). At least one State (Florida) permits the court terminating parental rights to order post-termination contact to be reviewed upon the adoption of the child. This may be a useful mechanism when the child has a need for post-termination or post-adoption contact and the adoptive parents have not been identified at the time of termination of parental rights and the birth parents will not be present at the adoption.

Many foster children have psychological connections to their birth families, siblings, and other significant persons, such as foster parents, so that it would be in the child's interest to maintain some sort of contact even after adoption. The child may need to know and understand his or her ethnic background and heritage. There may be a need to share medical information and health histories. Preservation of an emotional tie may be beneficial to the child. Continued contact may relieve an older child's guilt or concerns about the birth parent. Contact may help the child come to terms with his or her past. A connection with a biological parent may be a positive, yet limited, influence, and may prevent the child from running away or disrupting a new placement where the child desires continuing ties. Continued contact may avoid the trauma of contested and prolonged termination of parental rights proceedings. Children generally benefit from contact with siblings. These needs may be recognized and agreed to by the new parents and approved by the court. The contact could be as simple as exchanging photos each year without any physical contact, but the arrangements could leave a door open for future relationships *when helpful to the child.*

Birth parents, when given a chance, can be tremendous resources in planning for their children and their participation can have positive outcomes for adoption. For many years, certain adoption agencies have placed children in adoptions where birth parents maintain contact and exchange information. This happens with infant adoption, direct consent adoption, and in adoptions within the extended family. These "open adoption" arrangements are often negotiated in the context of an adoption of older children, especially children with special needs, who have been in foster care before being placed for adoption. In appropriate situations, even where child protection proceedings have been initiated, States could encourage birth parents' involvement in planning for relinquishment of parental rights and adoption of the child. (Voluntary relinquishment by parents is discussed in Chapter V, Non-Adversarial Case Resolution; and in Chapter VI, Termination of Parental Rights. The reader should refer to those sections.)

On the other hand, there may be pitfalls to maintaining ties between birth parents and their children after children are placed into new permanent homes. For example, birth parents might only reluctantly accept the new placement and may later try to disrupt or undermine it. The child may be fearful or resistant to continuing contacts. The **Guidelines** which follow recognize that determining whether an individual child needs a permanent placement with ongoing birth parent-child contacts or contacts with siblings or members of the extended family

is a subtle and sophisticated task. Each case is unique and demands thoughtful and expert consideration. Any post-adoption contact agreement must be voluntary, whether it is ratified by the court or not. In some cases, however, there are no court orders and final discretion is left to the adoptive parents while in other cases contact agreements are ratified by the court and become legally enforceable.

Adoption with contact will be most successful when all of the parties to the contact agree (1) that the contact should occur; (2) what type of contact should occur; (3) how or where the contact will occur; and (4) how frequently the contact will occur. Such agreements should be flexible enough to accommodate the changing needs and abilities of all the parties, particularly the child. The parties could agree simply that the adoptive parents will keep the birth parents informed about the child through voice, written, photographic, or videographic communication. Or the parties could agree to face to face visitation. Or they could agree to any combination of the two simultaneously or chronologically. The important issue is that the parties are comfortable with the agreement.

To determine whether post-adoption contact is warranted, the primary concern is whether it will meet the child's needs, interests and desires, not the needs and interests of the adults involved without necessarily benefiting the child. "Adoption with contact" will likely promote settlement of some termination of parental rights cases. The court, however, should not allow adoption with contact merely because it is a convenient settlement option for parents facing a strong termination of parental rights case. Nor should it be allowed merely because it is more expeditious and convenient for an agency unwilling to put time and energy into a difficult termination of parental rights case. "Adoption with contact" must serve the best interests of the child.

Post-adoption contact, particularly between the child and birth parents, may be contraindicated under certain circumstances. Contact should not be allowed if the child is fearful of the parent or fearful that he or she will be removed from the adoptive home and returned to the parent, for example, when the child has had many placements and does not have strong ties to the parent, or if there is evidence that post adoption contact will undermine the integrity of the adoptive relationship.

A subset of the Expert Work Group preferred not to recommend any post-adoption legally enforceable rights of contact between a child and members of his or her family of origin, particularly those against whom there was an adjudication or stipulation of child abuse or neglect. The minority view among the Expert Group was that contacts between adoptive and biological family should remain entirely voluntary with no enforceability by the court. They felt that an enforceable right of contact, even when based on initial agreement among the parties, erodes the exclusive rights and prerogatives of the adopting parents. In this view, the government should not continue to be involved in the lives of families once an adoption is approved because adoptive families are entitled to as much autonomy as any other legally recognized family. One precedent for this view is the Uniform Adoption Act proposed to the States by the National Conference of Commissioners on Uniform State Laws (NCCUSL), and approved by the American Bar Association. In the Uniform Adoption Act, post-adoption visitation arrangements

between adoptive parents and birth parents or other members of the child's biological family are permitted; however, they are not enforceable by the court except in the context of adoption of a child by a stepparent.

Clarity within the statutes is important to give guidance to the court and parties and to diminish the likelihood of future litigation. States must strike a balance between enabling parties to change orders and making such actions so accessible that the parties will be in court unnecessarily. The Guideline proposes that only a party to the agreement may move to enforce it. Typically the parties to the agreement will be the child, adoptive parent(s), and biological parent(s) but, in some cases, could include siblings, grandparents or other relatives, foster parents, or any other significant person in the child's life. The Expert Work Group anticipated that only a person who is accepted by the court as a party to the post adoption contact agreement at the time of the signing of the agreement or entering the agreement into the court record would be able to move to enforce the agreement. Many of the existing post adoption contact statutes provide that contact can be modified or terminated only (a) when the parties agree or circumstances have changed and (b) it is in the child's best interests. This standard strikes an appropriate balance because it does not permit frivolous actions and protects the best interests of the child.

As is recommended elsewhere in the **Guidelines**, the same court that orders the termination of parental rights should have jurisdiction over the adoption. The court can provide an important bridge between the two legal proceedings and protect the child's family ties when they exist. The same court would be the forum for any subsequent motion to enforce a post adoption contact agreement, but would otherwise not monitor or supervise the adoption.

GUIDELINES FOR PERMANENT GUARDIANSHIP

4. *Permanent Guardianship.* **We recommend that State law provide for Permanent Guardianship, as follows:**

   a. **State law should authorize courts to award permanent guardianship to an individual or couple who will serve as permanent caregivers of a child without ongoing State supervision, based upon court determination that it is in the child's best interest.**
   b. **State law should authorize the same court conducting the adjudication of child abuse or neglect to establish a permanent guardianship.**
   c. **Permanent guardians should have legal custody and control of the child including the power to make decisions concerning the child's care, education, discipline, and protection. Birth parents may retain some ongoing contacts with the child and may retain the obligation to pay child support.**
   d. **Suitable relatives should be initially preferred for all placements, including placements for permanent guardianship. In a contest for guardianship there should be a presumption that the best interests of the child are served by placement with a relative unless a person competing for permanent**

guardianship has an established custodial relationship, having had custody of the child for 12 of the past 18 months. In that case the court shall evaluate the competing guardians on an equal basis with no presumption and should award custody based on the best interests of the child.

e. **Standards for Permanent Guardianship: Before ordering a child to be placed in the permanent custody of the guardian, the court must find by clear and convincing evidence that each parent's neglect, abuse or incapacity is of such a serious nature as to demonstrate the parent's permanent inability to provide for the child. A child aged 12 or older must consent. Further, the court must find that an adoption is not possible or appropriate for the child, that the proposed guardian is suitable and able to provide a safe and permanent home, and that the permanent guardianship is in the best interest of the child.**

f. **State law should bar courts from setting aside a permanent guardianship except by a showing of clear and convincing evidence that the guardian has failed, or is unable, to provide proper care and custody of the child.**

g. **For permanent guardianship to be a legal option that provides stability and permanence for the child, children with special needs should be eligible for placement subsidies.**

Commentary

A legally secure permanent guardianship could provide an appropriate permanent plan for those children whose return home or adoption is not appropriate or possible. Children in permanent guardianship would not require on-going court or agency supervision. Parental rights might not be terminated but the custodial rights of the parents would be transferred to the guardians. In most States, there is no form of guardianship or custody that is designed to provide a secure permanent arrangement for children who are not going to return to their birth parents or be adopted. While there are a number of distinct legal categories of custody and guardianship available, most are easily revoked and provide inadequate legal protections for the guardian or custodian as well as inadequate permanence for the child. [See M. Hardin, *Legal Placement Options to Achieve Permanence for Children in Foster Care*, in Foster Children in the Courts 128, 150-170 (M. Hardin ed. 1983).]

The Adoption and Safe Families Act of 1997 (ASFA) allows the court during a permanency hearing to consider both adoption and legal guardianship as permanent placements [Adoption and Safe Families Act of 1997, Public Law 105-89, §302 amending 42 U.S.C. §675(5)(C)]. Permanent guardianship under State law should be consistent with the Federal definition of legal guardianship in ASFA:

> The term 'legal guardianship' means a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decision making. The term 'legal guardian' means the caretaker in such a relationship.
>
> ASFA, Public Law 105-89, §101(b), 42 U.S.C. 675(7).

Because the goal of permanent guardianship is to create a permanent *family* for the child, guardians should be adult individuals or couples, rather than public or private agencies. Once a permanent guardianship is established, there should be no on-going court review or agency supervision of the guardianship. The only exception is that the court would retain jurisdiction, just as it would in child custody determinations following divorce, to consider any subsequent motions to modify or terminate the guardianship or enforce orders of child support.

The judge handling the child protection proceeding should have authority to order a permanent guardianship. An efficient legal process should address the whole needs of the child consistent with the principle of one child, one judge. In States where guardianship requires a separate proceeding in another court, there are formidable procedural barriers and guardianship is sometimes avoided when it is most appropriate for the child and family. California, Michigan, and Rhode Island, among other States, authorize the court hearing a child protection case to order guardianship.

The permanent guardian would exercise full rights and responsibilities concerning the child including the obligation to support the child. Birth parents could retain an obligation to contribute to the support of a child to the extent of their financial abilities if ordered to do so by the court. Courts could enter standing orders for support as part of the guardianship order, as appropriate in the circumstances. The court may reserve certain contact to the parents in the decree of permanent guardianship, including rights of visitation with the birth parents, siblings, and/or extended family. The court decree of permanent guardianship divests the birth or prior adoptive parents of legal custody and guardianship but does not terminate their parental rights. Thus the decree of permanent guardianship differs from an adoption in that it does not affect a child's inheritance rights or rights to other government benefits (e.g., social security in certain cases) from and through the birth parents. (See M. Hardin, *Legal Placement Options to Achieve Permanence for Children in Foster Care*, *supra*, at pages 171-3.) In fact, one legally significant difference between adoption with contact and permanent guardianship can be the survival of financial rights and benefits from the parents.

Permanent guardianship achieves a legally protected permanency but without terminating parental rights. Some legal theorists distinguish between three levels of parental rights: custody (to have physical possession and responsibility for daily care); guardianship (the right to make the important decisions for the child); and residual rights (connection to the biological extended family, rights of inheritance, and the possibility of regaining custody or guardianship, should one lose them temporarily).

Termination of parental rights generally terminates all legal relation between the child and the extended biological family whose legal connection is derived from the parents' rights so that the child is no longer related and becomes a legal stranger to them. (Similarly, in adoption the child acquires a new set of parents and a new extended family.) In a permanent guardianship the child remains legally related for inheritance purposes and may receive government and other benefits from the biological mother and father and the extended biological family. Should the permanent guardianship be terminated, for example, by death or disability of the guardian, the parents and extended family members retain their legal relationship with the child. They could have a right to be notified and attempt to show the court that the guardianship should be terminated completely, restoring the rights of the parent or parents, or that the court should appoint another relative as successor guardian for the child.

Obviously this legal status is not for every child. The **Guidelines** recommend that adoption remain the preferred permanent placement for children who cannot be reunited with their biological parents. Permanent guardianship may, however, serve some children very well. The judgment as to when this status is in the best interests of the child is legally and psychologically complex and should be made on a case-specific basis.

This Guideline also recommends that a preference for relative placement be reflected in State law. Federal statutes allow States to consider a preference for relatives in the placement of children out of home. The Federal Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 added a new State plan requirement under Title IV-E of the Social Security Act:

> "(19) ...[T]he State shall consider giving preference to an adult relative over a non-related care giver when determining a placement for a child, provided that the relative care giver meets all relevant State child protection standards."
>
> Pub. Law 105-33, amending 42 U.S.C. §671(a).

The preference for relative placement should not be the sole determinant in all cases, however. The purpose of giving preferences to relatives is to preserve the child's existing family ties and to recognize the importance of family relationships in our society. These purposes may be overridden when a child has deep emotional ties with an unrelated person. If a child has a strong psychological parent-child bond with another caregiver such as a foster parent, granting preference to the relative may not serve the interests of the child. In that case, the court should consider the prospective guardians with no legal presumption in one direction or another but taking into account, among other things, the importance to the individual child of the existing psychological bond and of maintaining ties with the birth family.

Barriers limiting relative involvement must be removed. As discussed elsewhere in these **Guidelines** (see Guideline 1, above and Chapter IV, Court Process), relatives should be aggressively identified, recruited and assisted in their efforts, if willing to adopt or become guardians. Relatives should have adoption counseling available to help them make a decision about taking a related child into their immediate family.

Because a permanent guardianship would be legally secure and very difficult to set aside, fairness, particularly to the parents, warrants application of strict standards. Permanent guardianship is not a status to be entered into lightly. State law should require that the court make a record in support of the guardianship including, where applicable, the fact that prior to the permanent guardianship, the child was in State custody as the result of parental abuse or neglect and parents were not able to resume care. Developing a sound legal record in support of the permanent guardianship protects the status from challenges except on the grounds cited below.

Permanent guardianship may be based on the consent of the parties if a factual basis for the guardianship is preserved on the record. All parties need not consent to a permanent guardianship, however, and the court may order permanent guardianship following a contested hearing.

In Washington, for instance, a form of guardianship may be ordered after proofs equivalent to those required for termination of parental rights. (Rev. Code Wash. §13.34.230.) In Minnesota, following a Permanency Planning Hearing, if the child is not returned home, permanent legal and physical custody may be given to a relative. [Minn. Stat. Ann. §260.191 (3b)(a)(1) (West Supp. 1997).] Permanent custody with the relative resolves the child protection case, entitles the child to remain with that relative indefinitely, and gives the relative full parental rights.

In addition to finding that parental neglect, abuse or incapacity is of such a serious nature as to demonstrate permanent parental inability to provide for the child, the court must find that an adoption is not appropriate for the child.

Examples of factors a court could consider in determining whether adoption is appropriate include evidence of the following:

- Skilled counseling to enable the child to grieve and accept the possibility of adoption when the child is older and/or unwilling to cooperate with adoption;
- Efforts to secure an adoptive family including the use of adoption exchanges and other adoption recruitment efforts;
- All interested inquirers have been considered as possible adoptive parents regardless of race or geographic location of the inquiring families;
- Medical and financial subsidies to which the child is entitled have been offered to potential adoptive parents including supports that are available for non-adoptive placements;
- Counseling has been provided to potential guardians about the benefits of adoption;
- The social service agency has engaged in efforts to eliminate other possible systemic barriers to adoption such as availability of services to enable independent living for children with developmental disabilities;
- The child is living with a relative or caregiver who is committed to be a party to a legal guardianship and agrees to raise the child to adulthood but is not willing to

support termination of parental rights and expects to secure a voluntary relinquishment;
- The child's behavior is so violent that he or she cannot live in a family setting of any kind.

The court must also find that the proposed guardian is suitable. In cases where the child has been living with the guardian, the quality of care will help establish this suitability, along with a careful home study and criminal and other background checks. In cases where the child has not been living with the guardian, the agency and court might rely entirely on the home study and background check, or the court might delay a permanent decision until the child has been in the home for a trial period.

When an adult individual or couple has permanent legal guardianship of a child, the legal position of the guardian should be as secure as that of a typical birth or adoptive parent. That is, it should not be possible to remove the child from the guardian unless it is shown that continuing placement in the home is detrimental to the child. If there is a report of child abuse or neglect, the child protection agency will have to provide the same evidence and proof that would be required against a biological parent. If a custody dispute in the context of divorce occurs between two guardians, the court would address the questions the same way it would handle custody disputes involving biological or adopted children.

The **Guidelines** would give protection to permanent guardians, even against a challenge by birth parents. Although permanent guardianship is intended to last forever, parents would not be prohibited from applying to the court for custody if the permanent guardianship were dissolved for some reason, such as the guardian's death or disability. Guardians should take a long-range view of their responsibility for the child, however, including planning for their own death or disability by nominating a successor guardian in a will or designating a standby guardian.

Another way in which Federal law affects legal permanent placement options is through the availability of Federal matching funds. Through the Federal Adoption Assistance program, 42 U.S.C. §673, persons who adopt eligible foster children with special needs are able to obtain Federally matched payments to enable them to financially afford to care for children with special needs. There are no equivalent Federally matched payments for children covered by legal guardianships. Under the Title IVE Demonstration Authority, several States are testing legal guardianship as a permanency provision for children for whom the agency cannot locate adoptive parents. [42 U.S.C. §1320(a)(9), as amended by ASFA, §301.] States with waivers to permit subsidized guardianships include Oregon, Illinois, and Delaware. In addition, a number of other States provide guardianship subsidies using State funds. Among these States are Alaska (for Native Americans), California, Colorado, Hawaii, Illinois, Massachusetts, Nebraska, New Mexico, South Dakota and Washington. (See Takas, *Kinship Care and Family Preservation: Options for States in Legal and Policy Development,* ABA Center on Children and the Law, 1994; and Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Co-Guardians and Child Welfare*, Vera Institute of Justice, New York, 1993.)

In calculating the cost of subsidized guardianships, it is important for State legislatures to take into account the savings from reduced administrative costs. That is, when children are moved from foster care into a subsidized permanent guardianship with an adult individual or couple, the State no longer has to pay for the administrative and court costs (staff time and other expenses) related to monitoring and overseeing the child and foster home placement. Consider the large number of public employees who are no longer required to supervise the child's life. They include judges, lawyers for the State, child advocates, parents' attorneys, court clerks, bailiffs, caseworkers, supervisors, agency administrators, and more. Children benefit because guardianship provides more stability than long-term foster care and removes the stigma of being a foster child.

GUIDELINES FOR STANDBY GUARDIANSHIP

5. *Standby Guardianship.* We recommend that State statutes provide for the legal option of Standby Guardianship, which allows a chronically or terminally ill parent to authorize another adult person to serve as guardian of a child when the parent dies or becomes temporarily or permanently incapacitated.

Commentary

Standby guardianship is a legal mechanism that transfers decision-making for children in those circumstances where a custodial parent suffering from a chronic or terminal illness is able to designate a person to care for the child during the time the parent is unable to care for the child or upon the parent's death.

With respect to Standby Guardianship, ASFA contains the following language:

> SEC. 403 SENSE OF CONGRESS REGARDING STANDBY GUARDIANS
> It is the sense of Congress that the States should have in effect laws and procedures that permit any parent who is chronically ill or near death, without surrendering parental rights, to designate a standby guardian for the parent's minor children, whose authority would take effect upon:
>
> (1) the death of the parent,
> (2) the mental incapacity of the parent, or
> (3) the physical debilitation and consent of the parent.

A parent can arrange for a Standby Guardianship without immediately ending his or her parental rights. If the parent dies, the Standby Guardian can become guardian and also should have the option of applying for adoption. Standby Guardianship may be an appropriate option where parents are terminally ill (e.g., with cancer or HIV/AIDS) or when they suffer from a disease or disorder that will become incapacitating. Standby Guardianship allows terminally ill parents to choose who will become their child's guardian. It allows the parent to develop a practical plan for transition of responsibilities. It allows the identified guardian to take over the parental functions when the birth parent dies or becomes incapacitated. New York was one of

the first States to enact Standby Guardianship. (See NY SURR.CT.PRO. sec. 1726.) At least nine States have enacted Standby Guardianship laws. (See Y. Samerson, *Choices for Terminally Ill Parents: A Guide for State Lawmakers*, American Bar Association, 1997.) The National Conference of Commissioners on Uniform State Laws proposes a standby guardianship in its Uniform Guardianship and Protective Proceedings Act (1997), Section 202 (b). Thus, there has now been significant experience with Standby Guardianship as a legal option for permanence.

California allows for "joint guardianship" for terminally ill parents, which is similar but not identical to Standby Guardianship. (Calif. Prob. Code Section 2105) Joint guardianship allows the parent and guardian to have decision-making authority for the child at the same time, while the parent is still alive and not yet incapacitated. It also allows the surviving joint guardian to automatically take over upon the death or incapacity without confirmation by the court. Eliminating the requirement of court confirmation following the triggering event may create a smoother shift of authority than many Standby Guardianship procedures. New York's Standby Guardianship statute, however, permits immediate commencement of the guardian's authority without court confirmation if the parent provides written consent that is filed with the court within 90 days. [S1726(3(e)(iii).]

GUIDELINES FOR PLANNED LONG TERM LIVING ARRANGEMENTS WITH A PERMANENT FAMILY

6. ***Planned Long Term Living Arrangements:*** **We recommend that State law provide for planned long term living arrangements, as follows:**

   a. **While State law should authorize courts to approve long term living arrangements with a specific and identified permanent family for a child who will not return to his or her family of origin, it is the least preferred choice among the permanent placement options. It should be permitted only under strictly limited circumstances.**

   b. **State law should authorize long term living arrangements with a specified family only upon a court finding that one of the following two situations exists:**

      (1) Older child, stable foster home, with ties to birth family:
      - **There exists a documented, positive, and ongoing relationship between the child and birth relatives or other caregivers;**
      - **There exists a stable foster care placement that is predicted to last until the child leaves foster care or reaches majority; and**
      - **The child has attained the age of 14 and agrees to the plan; or**

      (2) Child with serious and profound disability:

- **The child has serious and profound physical, emotional, or mental disabilities;**
- **It is unlikely that adequate services could be guaranteed in a subsidized guardianship or adoptive placement; and**
- **There is a long-term stable relationship.**

c. **Before permitting extended long term living arrangements with an identified and permanent family without a current plan to achieve permanent placement, State laws should require that a court find by clear and convincing evidence that the preferred permanent placement options of adoption and guardianship are not available or appropriate for this child.**

Commentary

For several reasons, planned long-term living arrangements are by far the least desirable option among the permanent placement options when a foster child cannot safely return home. First, the foster parent and the children placed with them have the least protection against change of placement or overly cautious decision-making by agencies and courts. Second, the State continues to have decision-making power over the child, fragmenting both responsibility and decision-making and minimizing the permanent caregiver's role. Third, there is the greatest practical risk of placement disruption.

State regulations and policies should specify the limited situations in which planned long-term living arrangements can be designated. Long-term living arrangements should not be permitted when other legal options are practical and available.

Note that planned long-term living arrangements are legal permanent placement arrangements only when the child is placed with an individual or couple who are to serve as permanent surrogate parents. Where a child with special needs is in the custody or control of a public or private agency, continuation of the placement should not be the permanent goal for the child.

Guideline 6b is based on the criteria for using long-term foster care set forth by the North American Council on Adoptable Children (NACAC) in *Achieving Permanence for Every Child: A Guide for Limiting the Use of Long-Term Foster Care as a Permanent Plan,* p. 23. Children in planned long-term living arrangements should continue to receive assistance from the State agency and supervision of the court, including continuing access to an attorney for the child. All should exercise great caution to support the family and child to prevent disruption of the placement.

Decisions resulting in permanent or long-term living arrangements should be based upon a thorough assessment of the child's needs *and* the family's capacity to meet those needs *currently and into the child's future*. Simply meeting State licensing standards is not sufficient.

A home study or an evaluation of the family, a written agreement between the agency and the family, the child's consent, and a statement of the family's intent to parent the child into adulthood should also be required. These materials should be discussed, developed, and agreed to by all parties, including the child, the surrogate parents, and the agency. Some States use a "permanent foster family agreement" (PFFA) to structure these arrangements, although commonly such agreements are not based upon a thorough assessment of the family's capacity to meet the ongoing, life-long developmental needs of the child and other safeguards envisioned in these **Guidelines**.

In addition to planned long-term living arrangements with a specified family, a small subset of the Expert Work Group would recommend long-term foster care in institutions, including group homes and other institutional settings such as orphanages.

Guideline 6c reflects that continued foster care in a placement not intended to be permanent is not an acceptable option for foster children unable to safely return home. Extended temporary foster care is justified only if diligent efforts to secure a permanent home for the child have been serious, sustained, and unsuccessful. Even less desirable is a situation in which the agency is no longer making ongoing efforts to achieve a permanent home for the child. This is justified only if the child is not able to function in a family environment even with adequate supports. Because extended temporary foster care is an undesirable option for any child, it should be used only in extreme conditions—that is, when no other choices are available. State laws should require clear and convincing evidence that all other options have been seriously pursued in a sustained manner and, despite diligent efforts, have been unsuccessful. More importantly, if such situations arise, every effort should be made to place the child in a planned, permanent home or to find other suitable permanent living arrangements that address the child's individual needs. Title IV-B Subpart 2 funds may be used by States for placement and post-finalization services.

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CHAPTER III: REASONABLE EFFORTS TO PRESERVE FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN

INTRODUCTION

"Reasonable efforts" requirements were introduced into child welfare proceedings by the Federal Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272 (AACWA). Since the enactment of AACWA, reasonable efforts has been a core concept in American child welfare and practice. The Federal Adoption and Safe Families Act of 1997, Public Law 105-89 (ASFA), maintained but refined this concept. ASFA provides that:

> (B) ... reasonable efforts shall be made to preserve and reunify families—
> (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and
> (ii) to make it possible for a child to safely return to the child's home;
> (C) if continuation of reasonable efforts of the type described in subparagraph (B) is determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child. [42 U.S.C. §671(a)(15).]

Federal law previously required States to make reasonable efforts to prevent placement and reunify families. It now also requires reasonable efforts to secure a new permanent family when it is not possible either to prevent placement or reunify the family.

These **Guidelines** are intended to assist States in implementing the procedural aspects of reasonable efforts requirements. Further, they are designed to help States identify and clarify what core services might be appropriate to assure meaningful rehabilitation services for a dysfunctional family and what services are appropriate to assure permanent placement of children unable to safely return home.

Requirements for case plans, administrative reviews, and permanency hearings support the reasonable efforts requirements.

The Federal requirement for reasonable efforts has three major prongs. First, children's health and safety must be the paramount concern in providing and reviewing reasonable efforts. [42 U.S.C. §671(a)(15)(A).] Second, the State agency must make reasonable efforts to preserve families before placing a child in foster care. These efforts are designed to prevent or eliminate the need for removing the child from his or her home and to make it possible for a child to safely return to his or her home. [42 U.S.C. §671(a)(15)(B).] Note, however, that the court may determine that reasonable efforts are not required in certain cases, as explained below. [42 U.S.C. §671(a)(15)(D).] Third, when the child's return home is no longer the appropriate plan,

reasonable efforts are required to arrange and stabilize a new permanent home for the child. [42 U.S.C. §671(a)(15)(C).]

The following **Guidelines** are designed primarily to help States establish criteria and procedures for deciding what services (reasonable efforts) they should provide to preserve or reunify families. For children who are not going to be reunified with their birth families, the **Guidelines** are designed to help States establish criteria and procedures for making reasonable efforts to find alternative permanent homes. The **Guidelines** recommend strengthening the courts' oversight both of agency case-by-case efforts to preserve and reunify the family and agency efforts to achieve alternative permanent homes. State laws concerning reasonable efforts must respect parental rights; accommodate children's need for timely, safe, and permanent homes; and observe basic fairness and due process of law.

This chapter provides an overview of the reasonable efforts doctrine, but not all guidelines concerning reasonable efforts appear here. Certain provisions concerning judicial oversight of reasonable efforts within specific stages of the court process appear in Chapter IV, Court Process. Chapter VI, Termination of Parental Rights, includes a discussion of when agencies must prove that they have provided appropriate services to preserve the family, as part of the grounds for termination.

GUIDELINES AND COMMENTARY

1. *Require Reasonable Efforts:* **We recommend that State law require the court to determine whether the State has made reasonable efforts to prevent placement, reunify the family, or secure a new permanent home for the child.**

Commentary

The reasonable efforts provision was established to limit unnecessary and inappropriate removal of children from their families and to expedite safe reunification of children through the provision of services. Although long an element of Federal law governing eligibility for Federal funds, the reasonable efforts requirement is not always incorporated into existing State law and procedure. The doctrine of reasonable efforts has become a core concept in American child welfare law and practice and should be reflected in State, as well as Federal, law.

2. *Convene State-Specific Study Commission:* **We recommend that as part of developing criteria and procedures for a State reasonable efforts policy, States should convene a commission of their most knowledgeable people.**

Commentary

States should develop criteria for reasonable efforts, a comprehensive catalogue of available services, and administrative and judicial policies to define and operationalize the reasonable efforts requirements. Federal law sets out a policy of reasonable efforts to preserve families, reunify families or find an alternative permanent placement for a child who cannot be reunified with his or her birth family. However, current Federal law allows the States to establish criteria and procedures for implementing a policy that defines reasonable efforts. Federal law also specifies circumstances in which the State may not be required to make reasonable efforts.

What "core services" should a State make available to (a) families in crisis and (b) children in need of a new permanent home? How can the State assure that needed services are provided promptly to prevent placement, reunify families, and find permanent homes for those children not returning to their birth families? By what process should a State decide whether or not to provide reunification services? Under what limited circumstances should the State immediately seek new permanent homes for children without first seeking to rehabilitate the parents? The process should be timely and fair both to children and parents.

State agency policies or regulations should clearly define the agency's obligations to make reasonable efforts to reunify the family. Clarifying these obligations gives the judge a more objective basis to determine whether reasonable efforts have been made and helps child welfare agencies know what is expected of them. State legislatures or agencies could ensure appropriate service delivery by clearly identifying a core of services generally needed by families of abused and neglected children. Once identified, the State legislature or agency could prioritize services by their effectiveness and their costs. The agency would then decide which of those services they could provide promptly to families with children in foster care. Legislatures could require State or local agencies to both develop and deliver this core of services. For example, a core of services might include, among others, substance abuse treatment, time limited counseling services, and in-home intensive services. Such services might also include limited flexible funds that could meet immediate material needs of families. (See M. Hardin, *Establishing a Core of Services to Preserve Families Subject to State Intervention: A Blueprint for Statutory and Regulatory Action*, 1992; G. Diane Dodson & M. Hardin, *On-Time Services to Preserve Families: A Guide for Child Protection Agency Administrators and Policymakers*, 1997; *Report: Reasonable Efforts Advisory Panel Meeting,* National Resource Center for Legal and Court Issues, ABA Center on Children and the Law and the National Child Welfare Resource Center for Organizational Improvement, University of Southern Maine, 1995.)

Though agencies need flexibility to determine the appropriate treatment techniques applicable to an individual family, many agency clients always need certain services. An organized set of these frequently needed services, available in sufficient quantities, will help avoid service delays that hinder timely attainment of permanent homes for children.

Identifying the core of services available for reasonable efforts and designing the criteria and process for determining how the State is to make reasonable efforts is a complex and

difficult task. To address these profound issues, States should enlist the assistance of their most knowledgeable people to carefully study the characteristics and needs of children who most often end up in long-term foster care in their State and the needs of the families of those children. One approach is to convene work groups including a range of key experts and stakeholders, to schedule regular meetings of the group, and to plan for that process to culminate in recommended agency policy, draft legislation, and court rules. Such work groups should take into account and not duplicate the State's judicial self-assessment.

Most States have recently conducted careful self-assessments of their courts' performance in child abuse and neglect cases, including the courts' oversight of reasonable efforts. Taking into account the results of the self-assessment, a new State study commission can focus on improving and organizing the delivery of services, implementing the new ASFA requirements, and improving coordination between service providers and the courts.

3. *Child's Health and Safety Paramount:* We recommend that State law require that, in the implementation of reasonable efforts, the child's health and safety be the paramount concern.

Commentary

Federal law does not require agencies to make efforts to prevent placement or reunify families where such efforts will endanger a child's health and safety. Federal law states that: "in determining reasonable efforts to be made with respect to a child ... and in making such efforts, the child's health and safety shall be the paramount concern." [ASFA, §101(a), 42 U.S.C. §671(a)(15)(A).] In addition, reasonable efforts to preserve the family are not required if a court finds that the parent has committed certain serious criminal acts against the child or against another child of the parent, which may jeopardize the child's health or safety. [ASFA, §101(a), 42 U.S.C. §671(a)(15)(D).] Finally, even if none of those specific circumstances applies, courts may exercise their discretion, in individual cases, to protect the health and safety of children. [ASFA, §101(d), 42 U.S.C. §678.] Thus, courts and agencies are not required to make reasonable efforts to preserve and reunify families if such efforts would not be possible without endangering a child's health and safety.

States' obligations to make "reasonable efforts" have sometimes been misinterpreted to require the endangerment of children for the sake of family preservation or reunification. To eliminate such misinterpretations, ASFA makes clear that efforts to prevent removal or to reunify a family are not required when such efforts would endanger a child.

State law should also specify that services are not required when such services might endanger a child's health and safety. State law should make it clear that agencies can respond flexibly in emergencies and when situations suddenly change. Further, it should be clear that when an agency takes such a step it will be considered to have made "reasonable efforts" to prevent placement or reunify the family. Sometimes temporary denials or cessation of services are reasonable.

State law can also make it clear to agencies and courts that service plans should not present undue risks to children. Agencies should not propose and courts should not approve services to prevent placement if those services would place a child in serious danger. Agencies should not persist in providing reunification services where doing so would be harmful or dangerous to the child, and courts should not approve the continuation of such services.

While an agency might not safely be able to prevent removal, it may be able to provide services that will permit a child's early safe return home. When an agency must stop a particular reunification service, other services might be helpful.

4. *Reasonable Efforts to Preserve and Reunify Families:* **We recommend that State law require that, in determining whether the State has made reasonable efforts to prevent placement and reunify the family, courts consider whether services to the family have been accessible, available, and appropriate. In evaluating the accessibility, availability and appropriateness of services, State law should require the court to consider the following:**

   a. **Dangers to the child and the family problems precipitating those dangers;**
   b. **Whether the agency has selected services specifically relevant to the family's problems and needs;**
   c. **Whether caseworkers have diligently arranged those services;**
   d. **Whether appropriate services have been available to the family on a timely basis; and**
   e. **The results of those interventions.**

Commentary

Federal law requires judicial findings that agencies have made reasonable efforts to prevent the need to remove a child from home or to make it possible for a child to return home safely. [42 U.S.C. §§671(a)(15), 672(a)(1).] State law can assure compliance with Federal program requirements for foster care and implement the reasonable efforts policy more efficiently if it adopts a procedure and substantive criteria in its own statutes or court rules. The court must determine whether reasonable efforts were made at the time a child is removed from home.

To define the meaning of the reasonable efforts obligation, it is helpful to break the obligation into its different elements. The first part of an agency's and court's obligations concerning reasonable efforts is to clarify the reasons for State intervention. That is, before determining whether an agency has made reasonable efforts to prevent the need to remove a child from home or to return the child home, a court must first clarify the danger to the child that required State intervention and document the problems precipitating the danger. Without knowing exactly what dangers prevent a child's immediate return home and what family problems create or maintain a dangerous situation for the child, the court cannot determine whether the agency's efforts to rehabilitate the family were reasonable.

Second, having identified the dangers and problems precipitating State intervention, the court must decide whether the services proposed by the agency are customized to the individual needs and strengths of the family and relevant to the problems requiring placement of the child. To decide if services are relevant, a judge might take into account other services the agency might have offered or possible interim caregiving. In other words, if some other form of available help to the family would have been far more likely to succeed, a judge might determine that there had not been reasonable efforts.

Third, the court must decide whether the agency caseworkers were reasonably diligent in implementing the agency's case plan for the family and the child. Agencies might adopt their own regulations specifying what concrete steps by caseworkers would constitute reasonable casework to rehabilitate a family. For example, the regulations might include the following:

- Caseworkers must closely consult with parents to develop a case plan (using a language translator if necessary) which elicits and takes into account their views concerning services, to make sure the services match their schedules, and to periodically determine whether parents feel that the services are helping.
- Caseworkers must oversee each service provider, explaining to the provider what each service is supposed to accomplish for the family and child, sending a copy of the case plan to the provider, and setting a timetable for each service. The caseworker is responsible for ensuring that the provider adheres to the case plan by checking up periodically with the provider to guarantee that the service is being provided as agreed and that parents are participating.
- Caseworkers must ensure that parents and children have access to services, including arranging for children to be present, when appropriate, and making sure that parents have practical means of transportation, taking into account the resources available to parents.
- Caseworkers must periodically visit children and parents in person as required by agency regulations or policy.
- Caseworkers must arrange for parent-child and sibling visitation.

Fourth, the court must decide whether appropriate services were actually available and delivered on a timely basis to help the family. While it is sometimes difficult for judges to determine whether or not public agencies have been "reasonable" in developing and providing services for families, such a determination is possible. For example, if the child welfare agency has a specific list of services that an agency provides to families, a judge could determine what services on the list were relevant to the family's problems and whether such services were provided to the family on a timely basis.

5. ***Reasonable Efforts to Finalize Placement:*** **We recommend that, in determining whether the State has made reasonable efforts to make and finalize a new permanent home for the child (in cases where reunification is no longer the child's exclusive permanency plan), State law instruct courts to consider whether services to achieve that goal have been accessible, available, and appropriate. In evaluating**

the accessibility, availability and appropriateness of services, the law should require the court to take into account the following:

a. **Whether the agency has identified an appropriate strategy to make and finalize a new permanent placement for the child;**
b. **Whether there has been diligent arrangement for the provision of those services; and**
c. **Whether adequate and appropriate services have been available on a timely basis.**

Commentary

Reasonable efforts to make and finalize a new permanent placement for a child who cannot be reunified with his or her birth family can be broken down into three basic issues. The first issue is whether the agency has identified an appropriate strategy to make and finalize a permanent home. For example, if the child has complex special needs, a judge might ask several questions. Has the agency selected a good specialized placement agency to find an adoptive home and is it offering adequate adoption subsidy and medical assistance protections? Does the agency plan to list the child with appropriate adoption exchanges? Has the agency explored all available families consistent with MEPA? (See generally, J. Hollinger, A Guide to the Multiethnic Placement Act of 1994, as Amended by the Interethnic Adoption Provisions of 1996, ABA 1998.)

The second issue for the judge is whether there has been diligent follow-through to provide those services. For example, a judge might ask the following questions. Has the agency taken timely steps to list the child with appropriate registries? Has the agency diligently searched for potential new parents? Has the agency fully explored whether relatives or foster parents are interested in adopting the child? Has the agency screened and tentatively selected potential new parents? Has the agency taken timely steps to complete home studies? Has the agency counseled and prepared the child for adoption? Has the agency proceeded to prepare adoption assistance agreements (where applicable)? Has the agency arranged for post-adoption services?

The third issue is whether adequate and appropriate services exist to place and stabilize the child in a new permanent home. For example, a judge might ask several questions. Has the agency explored the interest of relatives and foster parents in adopting the child? Is there an available adoption placement agency with specialized skills helpful to this child and a good track record? Does the State adoption agency permit adoption subsidy terms that will provide sufficient and secure services to the child to improve the odds of a stable placement? Does the public adoption agency promise other post-adoption services, as necessary to stabilize the placement?

6. ***Reasonable Efforts Include Concurrent Planning:*** **We recommend that State law indicate that reasonable efforts may include concurrent efforts both to reunify a**

family and to ensure that an adoptive or other alternative permanent home will be available if needed by the child.

Commentary

Concurrent planning means working to reunify a family while, at the same time, planning for the possibility that reunification will not succeed. In circumstances where the probability of successful reunification is unlikely, concurrent planning can benefit the child by reducing the length of time that the child is in a temporary placement. For example, an agency might seek out foster parents or potential adoptive parents who will be willing to adopt the child should reunification efforts fail. ASFA explicitly authorizes this practice by providing that "reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts [to preserve the family]." [42 U.S.C. §671(a)(15)(F).]

7. *Criteria for Not Requiring Reunification Services*: **Reasonable efforts to prevent removal of a child or to reunify a family are required in most cases. We recommend, however, that State law specify that the State is not required to provide reunification services if there is a judicial finding that the child cannot be safely returned home within a reasonable time, even if reunification services are provided. This is shown by parental behavior that includes one or more of the following:**

   a. **The parent committed murder or voluntary manslaughter, or conspiracy to murder another child of the parent, or committed a felony assault that resulted in serious bodily injury to the child or another child of the parent.**
   b. **The parent aided or abetted, solicited, attempted, or conspired to commit such a murder or voluntary manslaughter.**
   c. **The parent committed, solicited, aided and abetted, or engaged in a conspiracy to commit other specified crimes against children.**
   d. **The parents' rights to the child's sibling were previously involuntarily terminated.**
   e. **The parent abandoned a child for [30], [60], [90] or more days and the identity of the parent is unknown and cannot be ascertained despite diligent efforts to do so.**
   f. **The parent's abuse or neglect of the child, a sibling, or other child in the household was so extreme or repeated that any plan to return this child home would present an unacceptable risk. Factors the court might consider in determining the extent of risk include:**
      - **The seriousness of the injury or harm to the child or risk of injury or harm associated with the abuse or neglect;**
      - **Whether the abuse or neglect was the result of a parental character disorder or compulsion unlikely to change (e.g., as shown by extreme cruelty or sexual abuse); and**
      - **The frequency, number, and severity of incidents of abuse or neglect.**
   g. **The child's parent makes an informed and voluntary decision not to receive services or assistance to prevent removal or reunify the family.**

Commentary

Federal law provides that States are not *required* to make reasonable efforts to preserve or reunify a family in all cases, although State agencies and courts are *permitted* to extend prevention and reunification services to families even in circumstances where Federal law would not require it.

Most of the above criteria for not requiring reunification services are consistent with existing Federal law. Criteria a through c paraphrase CAPTA or ASFA, and criterion d directly reflects the ASFA exception to the obligation to provide reunification services. Similarly, while the language of criteria e and f was supplied by the Expert Group, it reflects or stands in place of ASFA language, particularly the language related to aggravated circumstances. Criterion g, however, was added by the Expert Group to the criteria already established by Federal law.

The above criteria presume it is highly unlikely that the child can be placed with the parent within a reasonable time even if services are provided to reunify the family. That is, when one or more of the criteria specified in this Guideline apply in an individual case, it is unlikely that reunification services can succeed within a reasonable time.

Under Federal law, States are not required to make reasonable efforts to preserve the family in all cases. ASFA, §101, 42 U.S.C. §671(a)(15)(D) provides that:

> [R]easonable efforts [to prevent the need for placement and to reunify the family] shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that--
>
> (i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);
>
> (ii) the parent has--
>
> (I) committed murder (which would have been an offense under section 1111(a) of title 18, United States Code, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;
>
> (II) committed voluntary manslaughter (which would have been an offense under section 1112(a) of title 18, United States Code, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;
>
> (III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or
>
> (IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or
>
> (iii) the parental rights of the parent to a sibling have been terminated involuntarily.

Thus, ASFA sets forth certain limited circumstances in which reasonable efforts to prevent removal and reunify the family are not required. These include the commission of certain specified crimes, as set forth above and that parental rights

concerning a sibling have previously been terminated. Beyond the mandatory circumstances, ASFA allows States to further define "aggravated circumstances."

Federal law requires a number of the circumstances listed in these **Guidelines**. Criteria a and b are based on crimes specified by ASFA and the Federal Child Abuse Prevention and Treatment Act (CAPTA), in which "reasonable efforts" are not required. [ASFA, §101, 42 U.S.C. §671(a)(15)(D)(ii); CAPTA, §107, 42 U.S.C. 5106a(b)(2)(a)(xii).] Criterion c invites States to add additional serious crimes, not specified by ASFA, as criteria for not requiring reunification services. Among other things, these might include crimes committed against children other than the child in question or the child's siblings. In particular, it might include crimes committed against another child residing in the child's household.

Criterion d, based on termination of parental rights to a sibling, is specifically required by ASFA as an exception to the obligation to provide reunification services. Some States think this ground is too broad and have elected to define it more narrowly. One way of doing this is to require that the States have made diligent efforts to rehabilitate the family in the case of a prior termination of parental rights.

Criterion e deals primarily with abandoned infants. ASFA and CAPTA require expedited termination of parental rights for abandoned infants. [ASFA, §103(a)(3), 42 U.S.C. §675(5)(E); CAPTA, §107, 42 U.S.C. §5106a(b)(2)(a)(xi)(I).] Since expedited termination is required for abandoned infants, it is also logical to include these as criteria for not requiring reunification services.

Criterion f includes cases in which returning the child home would be an unacceptable risk even if a parent appeared to improve as the result of reunification services. In these cases, there typically is a combination of factors demonstrating the extreme risk to the child. Among these factors are the severity of the harm or threat to the child, the number and frequency of incidents of abuse and neglect, and the particularly cruel or compulsive nature of the parent's acts. The Expert Work Group preferred paragraph f to the language identifying specific examples of "aggravated circumstances" that appears in ASFA (i.e., "sexual abuse, torture, or chronic abuse").

Criterion g involves the situation in which a parent chooses not to participate in services to try to preserve the family and not to accept other assistance. Rather than assuming that parents want to work toward family reunification, agencies should help the parents decide whether this is their goal. Of course, it is essential that the parent is properly counseled and the parent's decision is fully informed.

ADDITIONAL QUESTIONS AND CIRCUMSTANCES THAT STATES MAY WANT TO CONSIDER

A major area of controversy among the Expert Work Group was the relationship between those circumstances in which reasonable efforts are not required and the grounds for termination of parental rights under State law. At issue was whether the criteria for

not requiring reasonable efforts should be the same as certain grounds for the termination of parental rights. States need to consider and carefully debate this area.

The majority of the group thought that the two legal questions (to deny reasonable efforts or to terminate parental rights) were separate and should have their own criteria. A minority felt that certain grounds for the termination of parental rights—i.e., most of those termination grounds that do not require reasonable efforts—should be criteria for denying reasonable efforts. Whether or not there is a link between grounds for termination and criteria for not requiring reasonable efforts, the State needs to make certain that parents who can benefit from services will actually receive them and that parents' rights to due process are fully honored.

An additional area of controversy among the Expert Work Group related to additions to the criteria listed above. Several additional suggestions received some support within the Expert Work Group but were opposed by the majority. States considering such possible additions should approach them with caution, allowing thorough debate concerning their practical implications. The legislature should be convinced that any criteria it enacts for not requiring reasonable efforts will apply only in situations where reunification services clearly cannot help parents improve within a reasonable time. The following are the additional minority suggestions:

1. The parent had minimal contact or communication with the child for the previous three months for a child under three or for the previous six months for a child three or older, although the parent had the ability and opportunity to maintain such contact.

This involves cases of abandonment and extreme parental disinterest in which parents can be identified and located. Compare criterion e, above.

2. An unmarried father of an infant less than one year old has failed to visit the child, establish paternity, or provide financial support within 30 days after becoming aware of the child's birth; or did not attempt to seek custody within 30 days after becoming aware that the child was placed into foster care, although the father was informed of the opportunity to seek custody.

This deals with cases in which an unmarried father fails to come forward and either assume responsibility or assert paternity within a short time after a child's birth. The majority of the Expert Work Group was concerned about the strictness of the time requirements imposed on the unmarried father.

3. The child or a sibling was previously removed from home, returned home, and subsequently reabused or reneglected although, before the most recent incident, the agency had made appropriate and diligent efforts to preserve the family. In addition, the underlying causes of the episode of abuse or

neglect following the child's return were similar to the causes of the abuse or neglect occurring before the child was removed from home.

This deals with cases in which the agency has already made reasonable efforts to preserve the family, but in response to maltreatment of the child's sibling or in connection with a much earlier incident involving the same child.

4. The parent is addicted to drugs or alcohol, causing the parent to abuse or neglect the child, and prior to the child welfare agency's involvement, the parent has repeatedly refused or failed to complete drug or alcohol treatment.

This deals with the situation where, prior to child welfare agency involvement, the parent has already repeatedly refused or failed substance abuse treatment. The idea behind this suggestion is that if other agencies have already made their repeated best efforts to help, there is nothing more that the child welfare agency can do. The majority view is that when a parent is first threatened with loss of rights to a child, this often provides a new and more powerful motivation for the parent to stop or control the substance abuse.

5. The parent has an emotional or mental incapacity so severe that the parent cannot care for the child, taking into account the particular needs and condition of the child. There is no known course of treatment that can prepare the parent to care adequately for the child.

This deals with the situation in which a parent abuses or neglects the child due to a mental or emotional incapacity and the incapacity is so severe that there is no known treatment that can make it possible for the particular child to be returned home within a reasonable time. The idea behind this ground is that if mental health agencies have already made their repeated best efforts to help and the prognosis is poor, there is nothing more that the child welfare agency can do to prepare the parent to care for the particular child. The majority view is that psychiatry and psychology are not exact sciences and that there is danger of inaccurate diagnoses.

6. The child's parent has made no arrangements for the care of the child and the parent will be imprisoned for at least two years if the child is under three, three years if the child is under six, and four years if the child is six or older.

This would excuse the agency from making reasonable efforts to preserve the family where the parent has not made appropriate arrangements for care of the child (e.g., with relatives) and the parent will serve a long term of imprisonment, taking into account the age and needs of the child. The idea behind paragraph 5 is that, where the child is facing a long stay in foster care, the needs of the child for a permanent placement take precedence over parental rights. The majority noted that paragraph 6 includes situations in which there is not history of abuse or neglect prior to imprisonment and emphasized

that, in many cases, the parent-child relationship can be preserved through ongoing visits and contacts while the parent remains in prison.

8. ***Procedure for Determining Whether There Have Been Reasonable Efforts to Preserve the Family or to Finalize a New Permanent Home:*** **We recommend that State law require that:**

   a. **The agency should submit a sworn statement prior to any judicial hearing in which the court is to determine whether there have been reasonable efforts to prevent placement, reunify the family, or make and finalize a new permanent home for the child. This statement, which should be submitted to the court and the parties at least 5 days in advance of the hearing, should describe the reasonable efforts made by the agency or the rationale for not making such efforts.**
   b. **Following the hearing, the court will determine whether or not the agency made reasonable efforts and enter brief findings describing the efforts.**

Commentary

To ensure careful judicial deliberation concerning reasonable efforts, it is important to design a process which takes into account the agency's capacity to prepare substantive material in a timely manner and the time the court needs for review and deliberation. A report from the agency, submitted well in advance of the hearing, allows the parties to consider carefully whether reasonable efforts were made. If appropriate, it also allows them to introduce other evidence. A sworn statement helps ensure the accuracy of the report. This recommendation also appears in the *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases.* (The *Resource Guidelines* were first published by the National Council of Juvenile and Family Court Judges (NCJFCJ) in 1995 and have been endorsed by NCJFCJ, the American Bar Association, and the Conference of Chief Justices.)* Equally important is a careful thought process by the judge. The preparation of findings helps ensure thorough judicial deliberations. The findings also provide an authoritative record concerning the agency's efforts. This record can be invaluable in later hearings, including hearings on whether to return the child home or whether to terminate parental rights.

Much of the content of this Guideline is also covered in Chapter IV, Court Process, in the discussion of disposition, review, and post-termination of parental rights review hearings.

9. ***Procedure for Finding that Reunification Services Are Not Required:*** **We recommend that at any time, upon motion of any party or on the Court's**

* Copies of the *Resource Guidelines* were distributed to the Expert Work Group, along with various journal articles and other publications selected as background material for review and discussion in the work group or plenary sessions.

own motion, State statutes or court rules authorize the court to determine that reunification services are not required.

Commentary

The Guidelines recommend allowing any party to file a motion, at any time, asking the court to find that the criteria for not requiring reunification services are met. Such a motion might request the finding with regard to one or both parents. Thus, the State or child's attorney might choose to file directly for termination of parental rights at the beginning of a case. Or, after a period of reunification services, one party or another, or the court on its own motion, could move to suspend such services and move to termination of parental rights, guardianship or some other permanent plan for the child. Chapter VI, Termination of Parental Rights, recommends that a petition for the termination of parental rights may be filed at any time. Related matters such as a permanency hearing, a motion to excuse reunification services, or a petition for termination of parental rights should be consolidated and heard together to avoid duplicative proceedings.

Agencies and courts need enough information, early in each case, to determine whether circumstances exist in which reunification services are not required. Legislation may be necessary, for example, to authorize or require checks of parental criminal records when they have abused or neglected their children. It might be needed to allow agencies to review parents' mental health records and other background information, and to allow agencies to obtain speedy court orders, when necessary, to gain access to this information.

When an abused or neglected child enters foster care, the parties and the judge should routinely consider the possibility that reunification services might not be appropriate. Legislation or court rules may, for example, assure that parents are consistently asked whether they want reunification services. They may encourage parties to say (or judges to ask) whether reunification services should be required; specify at what stage these questions should routinely be asked; and authorize the judge to require further information to aid in a decision on whether reunification will be required.

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CHAPTER IV: COURT PROCESS

INTRODUCTION

To produce sound legal decisions for allegedly endangered children, the court process should be timely, thorough, careful, and meticulous. Above all, the court process must be fair to the child and the parents.

While State legislatures play an important role in assuring the fairness of court proceedings for abused and neglected children, the degree of State legislatures' involvement varies. For example, based on the State constitution and the relationship between the legislature and the courts, it may be appropriate in one State for the legislature to enact a comprehensive timetable governing all phases of the court process in child abuse and neglect cases. In another State, however, the legislature might more appropriately request that the court establish such timetables using its rule-making authority. Still another legislature might provide funding for courts to experiment with some of the reforms set forth in these *Guidelines for Public Policy and State Legislation Governing Permanence for Children* and the *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases.* [As indicated in Chapter II: Legal Options for Permanency, the *Resource Guidelines* were first published by the National Council of Juvenile and Family Court Judges (NCJFCJ) in 1995 and have been endorsed by NCJFCJ, the American Bar Association, and the Conference of Chief Justices.]

Many recommended **Guidelines** in this chapter may be implemented *either* through State statutes or court rules. Deciding what to include in legislation as opposed to court rules depends, in part, upon what can properly be addressed through court rules under a particular State constitution. (For a general discussion of this issue and citations to relevant authorities, see generally, M. Hardin & A. Shalleck, Court Rules to Achieve Permanency for Foster Children: Sample Rules and Commentary 3-5, ABA 85.)

GUIDELINES AND COMMENTARY

GUIDELINES FOR COURT STRUCTURE AND RESOURCES

1. *Goals of Court Process:* **We recommend that State law specify the following goals of the court process in child welfare cases. First, court process should protect the health and safety of endangered children. And second, court process should ensure the timely placement of each child in a safe, stable, and permanent home.**

Commentary

State law should make clear the overall goals of the court process in child abuse and neglect cases. It should be clear to judges, advocates, and parties that the law is to be interpreted to achieve the goals of child health, safety, and permanence.

2. *Support Improvements in Court Organization:* **We recommend that State legislatures ensure that courts handling child abuse and neglect cases are well organized to achieve the goals of child safety, permanency, and health.**

Commentary

The quality of the judicial decision-making process depends, to a large extent, on characteristics of judicial organization and structure. For example, it is important that the same court (and judge) hears all stages of a child abuse or neglect case. It is equally important that judges and attorneys receive specialized training concerning child welfare cases; that there are comprehensive deadlines governing the court process; and that the judiciary and bar handling child welfare cases are specialized in child welfare or other family matters. It is essential that adequate resources are available to the courts, including adequate staffing levels for judges and attorneys in child protection cases.

State legislatures can either determine or have a major influence on each of these issues. In many States, legislatures establish deadlines for several stages of the court process and enact laws affecting court procedure.

3. *Establish Time Frames for Entire Court Process:* **We recommend that State law ensure that appropriate time frames guide each stage of the case by:**

   a. **Setting comprehensive timetables for all stages of the case;**
   b. **Setting strict limits on continuances and extended interruptions of court hearings;**
   c. **Requiring monitoring of agencies' and courts' adherence to timetables; and**
   d. **Providing that child protection cases are not to be delayed to await resolution of related criminal proceedings, except based on unusual circumstances.**

Commentary

One of the most profound and intractable problems in child welfare litigation is that of delay. Overcoming this problem requires specific and tight deadlines for decision-making and a process for enforcing those deadlines. It is the responsibility of the legislature to make sure that deadlines are inclusive and lack overly broad loopholes.

Depending on the laws and constitution of each State, there are different ways to approach this problem. In many States, the legislature should set the deadlines for each hearing, including every step of the court process. In other States, the legislature might perform this function by asking the court to set such deadlines and by reviewing proposed court rules.
An important part of establishing timetables is setting limits on continuances and interruptions of hearings. While short continuances are sometimes necessary and appropriate, it is critical that judges not grant them routinely or too easily. In some courts, parties can easily waive deadlines, judges are permissive in accepting excuses for delays, and court staff organizes dockets so that contested hearings are frequently interrupted for weeks or months.

State court systems should monitor courts' compliance with mandatory time lines and should make public reports of their findings. Monitoring and public reports of courts' compliance with time lines in children's cases are recommended as a means to implement this Guideline. In Michigan, for example, statutes set specific time requirements and a recent statute requires the State Court Administrative Office to produce an annual report detailing courts' compliance with the time lines in child protection cases. (Mich. Comp. Laws Ann. §712A.22, 1998.)

In summary, these **Guidelines** recommend the following timetable for child protection cases:

Emergency Removal to Preliminary Protective Hearing and filing of Petition	*[24] or [72] hours*
Additional Hearing if party is not present at Preliminary Protective Hearing	*seven days after Preliminary Protective Hearing*
Pretrial Conference	*Timely*
Adjudication	*Within 60 days after Petition is filed*
Disposition	*Within 30 days after Adjudication*
Review Hearings	*Every 90 days after Disposition*
Permanency Hearing	*12 Months from removal*
Termination of Parental Rights:	
Filing Petition	*Any time when grounds exist*
	Within 30 days of Court Order at Permanency Hearing
Hearing	*Within 90 days of filing*
Decision by Court	*Within 14 days of beginning of TPR Hearing*
Post TPR Reviews	*Every 90 days from TPR until permanent placement*

Child protection cases should not be delayed routinely pending resolution of parallel criminal prosecutions. Delaying the child protection adjudication (trial) slows the later stages of the case and ultimately delays the achievement of a safe and permanent home for the child. Experience in many jurisdictions has shown that it is possible to complete the child protection adjudication first, without prejudicing or interfering with the criminal trial. (See Sprague & Hardin, *Coordination of Juvenile and Criminal Court Child Abuse and Neglect Proceedings*, 35 Univ. of Louisville J. of Fam. Law 239, 281-300, 322, 1996.)

4. ***Same Judge and Attorneys throughout Case:*** **We recommend that State law ensure that, when practical:**

   a. **One judge will hear the entire child protection proceeding from initial removal through ultimate discharge from court jurisdiction, including termination of parental rights and adoption proceedings.**
   b. **The same legal representatives for the child, parent, and State will remain involved during all stages of the proceeding.**

Commentary

In States where the legislature can define the jurisdiction of different courts and determine the structure of the court system, the legislature is in a strong position to ensure that a single judge will hear all stages of each child welfare case.

There are several important reasons for a single judge to hear all stages of the case. First, because the judge makes all major judicial decisions in each case, the judge acquires a greater sense of responsibility for the case outcome including achieving timely and permanent placement for the child. Second, because the judge hears all parts of a case, the judge is more fully informed of the facts of the case. Third, because the case stays with the same judge, it is easier to develop a stable case plan. Fourth, parties are more likely to obey court orders knowing they will return to the same judge. Fifth, because the judge knows the case better, parents and their attorneys are less able to use the same arguments or excuses more than once. Sixth, parties feel more connected to the judge because they always come before one person. Seventh, because the judge is able to experience the unfolding and development of each case, the judge can more rapidly learn about child protection law and practice. The principle of one judge hearing all stages of a case is recommended by the *Resource Guidelines* (p. 19).

Due process considerations do not prevent a single judge from hearing all stages of a child protection case. First, judges are deemed to have the ability to base their decisions only on material and competent evidence. Second, there are many other types of legal proceedings where a judge makes preliminary decisions and is later permitted to make final decisions in the same case. As the United States Supreme Court noted in *Winthrow v. Larkin:*

> Judges repeatedly issue arrest warrants on the basis that there is probable cause to believe that a crime has been committed and that the person named in the warrant has committed it. Judges also preside at preliminary hearings where they must decide whether the evidence is sufficient to hold a defendant for trial. Neither of these pretrial involvements

> has been thought to raise any constitutional barrier against the judge's presiding over the criminal trial and, if the trial is without a jury, against making the necessary determination of guilt or innocence. Nor has it been thought that a judge is disqualified from presiding over injunction proceedings because he has initially assessed the facts in issuing or denying a temporary restraining order or a preliminary injunction.
>
> 421 U.S. 35, 56, 1975.

Another example is temporary and final custody decisions in divorce cases. Still another is a judge who hears civil and criminal proceedings involving the same facts.

While the Expert Work Group unanimously approved the principle of judicial continuity in general, a minority thought that this principle should not necessarily include termination of parental rights hearings. Some members said that judges who have heard the earlier stages of a case should be able to excuse themselves from the termination hearing if they feel unable to make an unbiased decision at termination. Others agreed that a judge might appear biased if he or she had been warning the family about possible consequences for failing to improve their situation. Sometimes a judge cannot hear all stages of a single case. For example, a judge may become ill or otherwise require unexpected leave; it may make sense to allow another judge to hear an already scheduled review hearing instead of waiting for the leave to end. Or when a family moves from one jurisdiction to another, both courts might properly agree to transfer the case to the jurisdiction in which the family currently resides. Also, in jurisdictions where masters or hearing referees hear the initial removal hearing on an emergency basis after hours or on weekends, it may not be practical for the same master or referee to hear subsequent stages of the same case. Finally, the Indian Child Welfare Act may require a case involving an Indian child to be removed to a tribal court. (25 U.S.C. §§1903, 1911.)

It is also important that the same legal representatives for the child, parent, and State remain involved throughout the case. When the same attorney remains involved in all stages of the trial, the attorney will be more responsible and accountable for the case and better able to master the applicable facts and law of the case. Legislatures can help avoid transfers among attorneys in the same case through how they structure legal representation. For example, they can eliminate systems in which one legal office (e.g., a local office) represents the State in the early stages of the child welfare case and another represents the State in the termination of parental rights and adoption. The principle of continuous legal representation is also recommended by the *Resource Guidelines* (p. 22).

5. *Ensure Adequate Judicial Resources:* We recommend that State legislatures ensure that the courts have the capacity to:

- **a. Establish reasonable caseloads for judges and judicial staff in child welfare cases;**
- **b. Provide reasonable compensation for judges and court staff in child welfare cases;**
- **c. Train judges and court staff in child welfare litigation;**
- **d. Ensure competent legal representation for the State, children, and parents who are unable to afford counsel;**

e. **Encourage trained volunteer court appointed special advocates for each child by setting up child advocacy offices in each locale;**

f. **Develop child welfare judicial information systems and other forms of self evaluation to measure court performance for case management and track individual cases; and**

g. **Provide translators to ensure that parties can fully understand court proceedings and can communicate with counsel both inside and outside of court.**

Commentary

While improved statutory decision-making criteria and procedures can be very helpful in child abuse and neglect cases, their effect will be limited without providing adequate staff and support to the courts. For many years, Congress and State legislatures have imposed additional duties on State court systems without providing the additional staff and financial supports that are needed to perform those duties. (See, e.g., M. Hardin, *Responsibilities and Effectiveness of the Juvenile Court in Handling Dependency Cases*, The Future of Children, Volume 6, 111-125, 1996.) To achieve real reform in the court process, it is also necessary to provide funding and supports that will make it possible for courts to fulfill both the spirit and letter of legislative mandates.

For example, to achieve timely and fair decisions in child abuse cases, judicial caseloads must be low enough so that hearings can be set without undue delay and can last long enough to permit fair deliberations in each case. Judges must have staff who can monitor and measure court delays, set hearings within deadlines set by statute or court rule, and help the judge prepare proper notices and findings. Courts must have the equipment to prepare court orders and notices efficiently and to operate information systems which help them analyze their workloads, performance and outcomes, and the efficiency of the court process. Attorneys must have reasonable caseloads and adequate support staff, and equipment so they can properly prepare each case before going to court and comply with the court's deadlines. Volunteer court appointed special advocates for children (CASAs) must have sufficient training and staff support. In pursuit of the goal to have a CASA for every child, State legislatures should establish CASAs in every jurisdiction. There must be translators to ensure that parties fully understand the proceedings and are able to communicate with legal counsel outside of court hearings. On the other hand, if the legislature is to provide additional resources to improve child abuse and neglect proceedings, it is reasonable to expect the court system to provide certain assurances. In exchange for such resources, the court system should commit itself to devoting resources specifically to improving child abuse and neglect proceedings. The courts should also agree to measure and report on the impact of the additional resources.

6. *Ex Parte Orders to Protect Children:* **To ensure children's safety, we recommend that State law empower the court to enter *ex parte* orders on an emergency basis authorizing law enforcement or agency personnel to do the following without prior notice to a child's parent:**

   a. **Remove a child from home or expel alleged perpetrators from the home when necessary to protect a child from risk of imminent harm.**
   b. **Gain entry into a home, observe a child, or transport a child for medical examination, either to protect the child from risk of imminent harm or to avoid a possible loss of important evidence.**

Commentary

State child welfare and law enforcement agencies are often faced with severe emergencies that require immediate action to protect children from injury or trauma. Agencies need the authority to act promptly in such situations.

On the other hand, when possible, there should be prompt judicial oversight of agency decisions to remove children from their homes or to expel alleged perpetrators. To achieve prompt oversight, judicial officers should be available 24 hours a day to review agency requests, including requests by telephone. With such oversight available, it should be necessary only in the most extreme emergencies for agency workers or law enforcement officers to take forcible action without prior court authorization.

In many States, child welfare and law enforcement agencies have no authority to enter a home or examine a child without parental permission unless they also take a child into custody and file an abuse or neglect petition. Where there is reason to believe that a child may be abused or neglected but there is not a sufficient emergency to justify the immediate removal of the child, it should be possible to obtain judicial authority to enter the home, observe the child, and, if necessary, take the child for a medical examination. (See Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 Wash. L. Rev. 493, 544-48, 573-77, 1988.) Under a court order authorizing these actions, the agency would be required to return the child immediately if no evidence is uncovered showing that the child in fact has been abused or neglected.

7. *Consider Possible Alternatives to Emergency Removal:* **We recommend that State law require that, in making a decision to authorize emergency removal of a child, the court should consider whether services are currently available that could protect the child without removal.**

Commentary

In deciding whether to remove a child from home in an emergency situation, the court should consider not only the degree of danger to the child, but possible means to eliminate the

danger without removal. Of course, the judge should not be expected to accept services as an alternative to removal unless it is clear that services will eliminate the danger and that the services are available and in place.

8. *Evidence for Ex Parte Orders:* **We recommend that State law provide that a court may authorize emergency removal of a child, emergency expulsion of alleged perpetrators, or access to essential evidence based on probable cause. The court may consider all trustworthy and credible evidence, including hearsay, without prior notice to the parent.**

Commentary

In an emergency decision made without prior notice to parents, courts must be able to rely on hearsay evidence. It is usually not practical to obtain and provide first hand-testimony in an emergency situation. This is also the case, for example, when law enforcement agencies obtain search warrants in criminal cases.

GUIDELINES FOR PRELIMINARY PROTECTIVE HEARING

9. *Deadline for Preliminary Protective Hearing:* **We recommend that State law require a preliminary protective hearing within 24 - 72 hours of a child being removed from home or a suspected perpetrator being expelled from the home.**

Commentary

A preliminary protection hearing is the hearing in which the court decides, following the child's emergency removal from the home, whether the child may return home prior to the adjudication. It is referred to in some jurisdictions as a "shelter care hearing," "detention hearing," or "temporary custody hearing." It is usually the first court hearing in a child abuse or neglect case.

All States require such a hearing within a short period of time after a child has been removed from home without a prior hearing. This should also be available if a perpetrator has been removed from the home in an emergency situation.

Alternative time limits are suggested for the preliminary protective hearing. Some jurisdictions are able to hold the hearings within 24 hours of placement, while others, particularly those in rural areas, require more time. Some jurisdictions with short time limits like 24 hours exclude weekends and holidays. States should set as short a time limit for preliminary protective hearings as is practical for their courts and agencies, but not longer than 72 hours.

10. *Filing, Dismissal, and Amendments of Petitions:* **We recommend that State law require that: (a) the petition be filed on or before the preliminary protective hearing; (b) the case be dismissed unless the petition states a basis for court**

intervention and is supported by probable cause; and (c) the State can orally amend the petition based on the evidence presented at the preliminary protective hearing.

Commentary

This Guideline is designed to encourage courts to screen child abuse and neglect cases more carefully during the preliminary protective hearing. To assist the court in determining whether there is a basis for intervention, a petition must be filed by the time of the hearing. Then, the person filing the petition must show that the petition states a case for State intervention and that sufficient evidence exists to proceed further. To avoid dismissals based on pleading technicalities, the petition may be orally amended at the preliminary protective hearing, based on the evidence.

11. ***Removal of Child at Preliminary Protective Hearing:*** **We recommend that State law authorize the court, at the preliminary protective hearing, to order the child to be removed or remain away from home if:**
    a. **Leaving the child in the home may cause the child's death, physical injury, or emotional trauma or may cause the elimination of important evidence; and**
    b. **There are no available services or safeguards that can eliminate such risk if the child is placed in the home, even if the court orders such services or safeguards.**

Commentary

Removal of a child from home is a drastic step which can traumatize children. It should not be authorized unless the danger is significant and there is no other realistic safe alternative. Because alternatives to removal are a lesser intrusion on family life and less disruptive to the child, the judge should be empowered to order the parties to provide services or take other steps necessary to keep the child safely at home.

12. ***Findings at Preliminary Protective Hearing if Child is Removed:*** **We recommend that if the court removes a child pending adjudication the judge enter brief findings describing the risk to the child. The findings should also state why available services cannot help the child remain safely at home, and explain whether or not the agency made reasonable efforts to prevent placement.**

Commentary

Because of the seriousness of the decision to remove a child from a dangerous situation, there should be brief findings explaining the judge's decision. The findings serve two purposes: (a) they encourage the judge to deliberate carefully concerning the removal decision, and (b) they provide a record describing the precise facts underlying the judge's decision. The Federal requirement that the judge decide whether the agency has made reasonable efforts to prevent removal is discussed elsewhere. (See Chapter III, Reasonable Efforts to Preserve Families and Achieve Permanency for Children.)

Several steps are needed to help the judge to enter appropriate findings. First, court forms should be designed to help judges prepare the findings. Second, agencies should file brief reports that include the precise types of information needed by the judge to prepare the findings. Third, the hearing must be long enough to allow the parties to give testimony and for the judge to prepare findings. Such a hearing must last longer than most current emergency removal hearings. Emergency removal hearings are too often cursory and without meaningful procedural protections for the parties. The *Resource Guidelines* recommend 60 minutes for routine preliminary protective hearings (p. 42).

In many courts, judges, attorneys, and caseworkers have become used to court proceedings that do not carefully examine the nature of the emergency and alternatives to removal. As stated in a prior Guideline, the court needs adequate resources to set aside a proper amount of time for this critically important hearing.

13. ***Orders to Protect the Child Against Alleged Abuser:*** **We recommend that State law authorize the court to bar a person who allegedly abused or severely neglected the child from entering, or remaining in, the child's home. The court should also be authorized to order parents and other adults living there to take specified steps to protect the child.**

Commentary

Courts should be empowered to remove children from home, and also to take steps that are less drastic and less traumatic to the child. Such steps include removing the alleged perpetrator rather than the child from the home and requiring other caretakers to take specific actions to protect the child. A person excluded from the home who also is a party in the case is neither excluded nor excused from working with the agency and participating further in the court process.

14. ***Diligent Efforts to Notify Parents:*** **We recommend that State law direct the court to ensure that diligent efforts are made to notify parents. These efforts should include:**

- **a. Identifying both parents, including putative fathers, locating them, notifying them of the preliminary protective hearing, and helping them to attend.**
- **b. Continuing diligent efforts to locate any parents who do not appear at the preliminary protective hearing, to obtain service of process, and to inform them about the proceedings.**

Commentary

A key to successful permanency planning is to involve both parents in the court proceedings from the beginning. This requires notice and service of process on all parents. If the non-custodial parent is not located and served early and if efforts to work with the custodial parent are unsuccessful, agencies must begin their work with the non-custodial parent late in the case. This can extend the time the child remains in foster care and postpone the child's placement into a permanent home.

If parents are not present at the preliminary protective hearing, the court should ask detailed questions concerning why this is so and what the agency has done to try to get parents in court. When necessary, the judge should order the agency to take further specific steps to locate and notify missing parents.

If possible, putative fathers should be located, served, and tested for paternity before the adjudication hearing. This allows the court to resolve the issue of paternity at the adjudication. While the court should require diligent steps to complete paternity testing by adjudication, the adjudication hearing should not be delayed when testing has not been completed. In that case, the court should direct the child welfare agency and child support enforcement agencies to take continued steps to resolve the question of paternity as soon as possible. The Federal Adoption and Safe Families Act of 1997 (ASFA), §105, provides for the use of the Federal parent locator services to locate missing parents.

Where a missing parent is known not to be fluent in English or where persons who may know that person's location are not fluent in English, it is important that a person fluent in the parent's native language participate in the search. It also may be helpful in locating a parent that persons conducting the search understand enough about the parent's cultural background to know how to make culturally appropriate inquiries.

15. *Consider Alternatives to Removal of Child from Home*: We recommend that State law require the judge, when authorizing removal of the child from home or continued placement outside the home, to:

- **a. Consider the possibility of placing the child with members of the extended family; and**
- **b. Ensure that the agency promptly locates and considers extended family members as possible caretakers of the child.**

Commentary

42 U.S.C. §671(a)(19) allows States to consider giving preference to qualified adult relatives over non-related caregivers when placing abused and neglected children in circumstances where these relatives can meet the safety needs of the child. To put this policy into effect (and thus reduce trauma to children from avoidable changes of placement), it is important to consider relatives at the beginning of court intervention.

The first stage of the court process to address this issue is the preliminary protective hearing. If relatives are located later in the case, agencies and courts are forced to choose between the relatives and unrelated caretakers who may have developed close emotional bonds with the child. Ohio law requires the court to consider placement of the child with relatives during Ohio's equivalent of the preliminary protective hearing, and if placement with a relative is inappropriate, the court is to enter written findings to that effect. [Ohio Rev. Code Ann. §2151.314(B)(2), 1997.]

16. *Orders at Preliminary Protective Hearing:* **We recommend that State law require that, during the preliminary protective hearing, the judge decide what orders, if any, are needed for temporary visitation with parents, relatives, or siblings. The judge should also determine the need for temporary child support, physical or mental examinations of the child and parents, and restraining orders and other protective orders. In addition, the judge should identify the importance of locating and notifying missing parties and relatives, including unwed fathers; paternity testing; and other relief necessary to meet the needs of the child and cause an efficient and expeditious completion of the court process.**

Commentary

To achieve a timely court process for abused and neglected children, court proceedings must address issues and make decisions quickly. A thorough preliminary protective hearing can help accelerate the legal process without compromising fairness and careful decision-making.

17. *Representation of Parties at Preliminary Protective Hearing:* **We recommend that State law guarantee that parties be represented by counsel at the preliminary protective hearing and that both counsel and volunteer CASAs for children be appointed in advance of that hearing.**

Commentary

The preliminary protective hearing is a critical stage of the proceedings. At this hearing the decision is first made whether or not to remove children from parents. The court may take many other important steps at the hearing such as setting initial terms for visits and arranging for evaluations. Yet, parties are often not represented by counsel and the hearing is brief and cursory. Volunteer CASAs for children typically are not present. A fair process requires that parties have legal representation and that attorneys be appointed before the hearing so they can raise meaningful issues and assist their clients at the hearing.

GUIDELINES FOR ADJUDICATION

18. *Deadline for Adjudication:* **We recommend that State law require that the adjudication hearing take place as soon as possible but no later than 60 days from the time that a child is removed from home.**

Commentary

The term "adjudication" refers to the stage of the court process in which the court determines whether the allegations of child maltreatment are supported by the evidence and meet the statutory definition of child abuse or neglect. With this finding the court is legally entitled to temporarily curtail parental rights to make decisions concerning the child's future. In some States, the adjudication is referred to as the "trial," "jurisdictional hearing," or "fact-finding hearing". The adjudication hearing not only provides the court with the legal authority to proceed in the case, but also provides notice to all parties and creates the definitive record of child abuse. The timing and content of the adjudication order and findings and the parties who are brought into the case all affect the child's timely opportunity to find a permanent home.

The 60-day time limit for adjudication hearings is also recommended by the *Resource Guidelines* (p. 47). The 60-day period is recommended as an *outside limit* for adjudication with a preference for an earlier completion of the hearing if possible. The main reason for a deadline is that the earlier the adjudication, the sooner it is likely that a child will go home or be placed in another permanent home. Until the court has formally determined whether a child has been abused or neglected, parents may refuse to cooperate with the agency, blocking real progress toward family rehabilitation.

Some members of the Expert Work Group thought that the 60-day deadline is too long, noting that many jurisdictions successfully impose shorter deadlines. They agreed that in the life of a child, 60 days is a very long period of time. Further, prompt completion of the adjudication allows the agency to find a permanent placement for the child more quickly. Some jurisdictions have successfully required adjudication in far less than 60 days.

Failure to meet the 60-day deadline should not, however, require that the case be dismissed with prejudice, as would failure to comply with a speedy trial act in a criminal case. Abused and neglected children should not be endangered to enforce a deadline. Rather, the State must develop an alternative way of ensuring compliance. For example, the court system might monitor and enforce compliance by State trial courts.

19. ***Service on All Parties:*** **We recommend that State law require that all parties be formally served, including the mother, legal father, putative fathers, and legal guardians, if any.**

Commentary

The Commentary to Guideline 14 explains the importance of serving all parties prior to the adjudication. Parents should receive service of process in their native language when it is known that the parent does not fluently speak and read English and it is practical to prepare documents in the parent's language. The Indian Child Welfare Act, 25 U.S.C. §1912(a) requires that, in the case of an Indian child, the court shall also give notice to the child's tribe.

20. ***Standard of Proof:*** **We recommend that State law require that, at the adjudication hearing, the court will determine, based on plea or testimony, whether the statutory**

grounds for court jurisdiction have been proved by a preponderance of the evidence.

Commentary

The preponderance of evidence standard, the general civil standard of proof, is the most typical among the States. The higher clear and convincing evidence standard is not constitutionally required for an adjudication of child abuse or neglect that does not terminate parental rights and is not recommended by these **Guidelines**. It is feared that requiring the higher clear and convincing evidence standard would make it too difficult to protect a child in danger.

The unique history, Federal statutes, and political sovereignty of Native Americans, however, justify a different legal standard for American Indian children. Clear and convincing evidence is required to remove an Indian child from the home. [25 U.S.C. §1912(e).] The clear and convincing evidence must include testimony by qualified expert witnesses that services to prevent the breakup of the Indian family have been furnished. It must also show that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

21. ***Findings at Adjudication:*** **We recommend that State law require that, if the court finds that the statutory grounds for court jurisdiction have been met, the court should make specific findings concerning how the child was abused or neglected.**

Commentary

Findings of fact describing the parent's abuse or neglect comprise a critically important record of the actual abuse or neglect. The findings should help define the terms of the agency case plan, set a baseline against which progress is measured during review hearings, and establish the facts of the original abuse or neglect for any subsequent termination of parental rights hearing. (See *Resource Guidelines* (p. 47-48, 50.) As a matter of good practice, a judge might, after taking admissions from a parent, ask the parent to describe the abuse or neglect in his or her own words.

22. ***Determine Paternity at Adjudication:*** **We recommend that State law provide that, if putative fathers have been served and tested for paternity, the court should officially determine paternity at adjudication. If not, the court should issue further specific orders to complete these steps as soon as possible.**

Commentary

The Commentary to Guideline 14 recommends that putative fathers be located and tested for paternity, if possible, before adjudication. If paternity has been tested before the adjudication hearing, the court can make a formal determination of paternity. If not, the court should, at a minimum, order referral of the case to parent locator services and paternity testing.

Early determinations of paternity can help shorten the time that children must spend in foster care by allowing the agency to notify and begin work with the biological father early in the case. If paternity is not determined, and work with the father does not begin early in the case, the agency may be compelled to begin its work with the father late in the case. This can lengthen the time the child remains in foster care and/or postpone the child's placement into a permanent home.

GUIDELINES FOR DISPOSITION HEARING

23. *Deadline for Disposition Hearing:* **We recommend that State law require the disposition hearing to take place no later than 30 days after the adjudication, except where special circumstances, documented in the court record, necessitate delay. If the parties agree, the disposition hearing may take place immediately following the adjudication.**

Commentary

Disposition is the stage of the juvenile court process following adjudication in which the court determines who will have custody and control of the child. Depending upon the powers of the court under State law and the facts of the case, the court may also set the terms and conditions of the child's placement. This should include approval or modification of the child's case plan. This Guideline follows the recommendations of the *Resource Guidelines* (p. 55) as to the timing of the disposition hearing.

24. *Disposition Report and Case Plan:* **We recommend that State law require the disposition report prepared by the State agency and the case plan to be filed and sent to the parties at least 5 days before the hearing and to prescribe the list of issues to be addressed. The report should address each issue, in similar language, that the court is to address in its disposition orders and findings.**

Commentary

By matching the format and content of the agency's predisposition report to those of the court's disposition order and findings, agency reports will make it easier for the judge to prepare the order and findings. At the same time, an agency report in convenient form for the judge is more likely to be influential. For these reasons, these **Guidelines** recommend a nearly precise match between the issues to be addressed in the court report and the issues to be addressed in the disposition court order and findings. The *Resource Guidelines* and the ABA *Sample Court Rules to Achieve Permanency for Foster Children* also recommend matching the content of predisposition reports with disposition orders and findings.

The following is a list of topics that State law should require for the disposition report:

a. Recommendations for the custody and placement of the child;

b. If placement at home is recommended, proposed conditions to be required of the agency, parents, and other parties and the reasons for those conditions;
c. If out-of-home placement is recommended, an explanation of efforts to identify and locate relatives and recommendations concerning such placement;
d. If out-of-home placement is endorsed, recommended terms of visitation (including siblings and relatives, where appropriate) and child support;
e. A proposed case plan, including case goals, tasks, and timetables for parents (when applicable) and agencies;
f. Recommendations, if appropriate, for restraining orders, orders to stay away from the child or residence, domestic violence orders of protection, or other injunctive relief; and
g. If out-of-home placement with a goal of reunification is recommended, a statement regarding whether it is appropriate to pursue concurrent planning. The statement should indicate whether such planning can be achieved by placing the child with a relative or foster family willing to provide a permanent home for the child in case reunification is unsuccessful. If such a placement is appropriate, the statement should indicate what steps are needed to secure and stabilize such a placement.

A key part of the court report is the proposed agency case plan for the child and family. The case plan identifies the goals, tasks, and strategies to obtain a safe and secure home for the child. It should guide the interventions by establishing that they are necessary to safely return the child home. It should include a service plan for the child and family. Among other things, the case plan needs to address how issues of language and culture that are important to the child will be addressed.

Paragraph c creates an expectation that the agency will actively seek relatives as placement alternatives for abused and neglected children. For example, a recent Michigan statute requires the agency to identify, within 30 days of the first hearing, relatives potentially able to meet the child's needs and then make a placement decision within 90 days. (Mich. Comp. Laws Ann. §722.954a, 1998.)

Paragraph g asks the agency to consider concurrent planning in cases where the goal is family reunification. Concurrent planning means trying to place the child in a relative's home or foster home that is potentially a permanent home should reunification efforts fail. The Adoption and Safe Families Act of 1997 (ASFA), §101(a), 42 U.S.C. §671(a)(15)(F), provides that "reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts [to preserve the family]." Paragraph g calls for the agency to make recommendations to the court, in each case, concerning whether it should place the child with foster parents who are potential adoptive parents or permanent guardians. This discussion should be guided by the prognosis for resolution of problems that brought the child into care.

25. ***Admission of Hearsay Reports at Disposition Hearing:*** **We recommend that State law allow hearsay reports to be admitted into evidence at the disposition hearing even if they do not fall under a recognized hearsay exception under certain conditions. These conditions are: (a) the report is furnished to all parties at least 5 days before**

the hearing; (b) the report identifies its sources of information; and (c) parties have the opportunity to subpoena and cross examine the sources of the hearsay information at the disposition hearing.

Commentary

While use of hearsay information is appropriate in disposition hearings, in which the court approves a plan for the child, fairness requires that the parties have a reasonable opportunity to rebut the information contained in the report. Most States have statutes allowing the admission of hearsay reports in disposition hearings. However, few set precise limits such as those set forth in this Guideline.

This Guideline is consistent with the procedure approved in the U.S. Supreme Court case *Richardson v. Perales,* 402 U.S. 389 (1971). While *Richardson* is a social security case, its holding logically applies to disposition hearings in child abuse and neglect proceedings.

In *Richardson,* the Court upheld the use of hearsay doctors' reports in social security administrative hearings to determine eligibility for social security disability payments. The Court held that admitting the doctors' reports did not violate procedural due process because, among other reasons, *the claimant had advance notice of the doctors' identities and the content of their reports, the claimant had the opportunity to subpoena and cross examine the doctors, and the claimant could have requested a supplemental hearing to cross examine the doctors.* If the reasoning of *Richardson* is applied in child welfare cases, most hearsay should be admissible at disposition only if the parties have had a reasonable opportunity to subpoena and cross examine the sources of the hearsay information.

26. *Requirements for Disposition Hearings:* We recommend that State law set forth a comprehensive list of court actions, decisions, and findings that are to occur at disposition hearings.

Commentary

Clear and detailed disposition orders set the framework for subsequent judicial case review. With a strong disposition order, the frame of reference of the review can be whether the parties have adhered to the order, and if so, whether there is adequate case progress. The disposition hearing should also be coordinated with any internal agency review process.

The following is a list of decisions, findings, and actions that State law should require to occur in the disposition hearing:

a. If the case is not dismissed, the court determines the custody and placement of the child.
b. If a child is placed at home without dismissing the case, the court may specify any conditions that will be required of the agency, parents, and other parties.
c. If there are no services available that will allow the child to remain safely at home, the court approves out-of-home placement.

d. In cases where the court decides that a child will be removed from home or remain outside the home, the court may specify any further efforts to be taken to identify and locate relatives or whether the child will be placed with a relative. The court may give preference to placing the child with a relative who is fit and able to meet the safety and developmental needs of the child.

e. In cases where the court decides that a child will be removed from home or remain outside the home, the court orders terms of visitation and child support.

f. The court approves or modifies the terms of the case plan. Court orders modifying the plan, if supported by evidence on the record, may address services, foster placements, visitation between child and parents and among siblings, and timetables for tasks by parents and agencies.

g. If necessary, the court issues restraining orders, orders to stay away from the child or residence, domestic violence orders of protection, other orders meant to protect the child in his or her own home, or other injunctive relief.

h. The court explains to the parents that if they fail to make improvements or lose contact with the court or child welfare agency, the court may later decide to terminate their parental rights.

i. If the child is in foster care, the judge explains to the parents the legal process: (a) They have a maximum of 12 months from the date of the child's removal from home to make improvements or possibly lose all rights to the child. (b) The court has the authority to reduce the time and initiate the termination of parental rights (TPR) proceedings when parents are not making efforts or showing progress. The judge will ensure that parents understand the deadline and will provide them with a written copy of this advice.

j. If the child will be placed in foster care with a goal of reunification, the agency will pursue concurrent planning. Concurrent planning would involve placing the child with an individual or couple who are willing to provide a permanent home for the child if reunification is unsuccessful and, if such a placement is appropriate, a plan to secure and stabilize such a placement.

k. The court informs the parents of the availability of Non-adversarial Case Resolution services. (See Chapter V.)

l. At the conclusion of the hearing, the court sets the time and date of the next hearing.

m. The court may order parents to participate in services, to cooperate with the child protection agency, and to take any other actions necessary for the health or safety of the child.

The judge's review and consideration of the agency's case plan and the opportunity for input from attorneys for parents and children is the heart of the disposition hearing. The recommendations and case plan must be individually tailored to focus on the needs of the individual child and family. It should not simply consist of "boilerplate" clauses drawn from forms with little relevance to the child and family. Courts and agencies should work together in designing a State's disposition report and case plan forms and in providing good examples of completed reports and case plans.

A well-constructed and court-approved case plan guides all of the parties in working toward the case goal. The discipline of careful judicial scrutiny can help assure that the plan is well focused and designed to remedy the causes of the child's removal and that all parties are working toward a common goal.

States may want to consider a service agreement that includes obligations for both agency and parents. Courts commonly exercise power over parents, compelling them to take certain actions and refrain from others. The court should be able to order parents to do such things as participate in services, stay away from the child, visit the child, and cooperate with the caseworker. Courts commonly hold parents in contempt for failing to obey such orders, using fines and jail time as sanctions. These **Guidelines** take the position that such court authority over parents is appropriate.

Paragraph f calls upon the court to approve or modify the case plan. The court, after hearing from all affected parties in an open proceeding, should be empowered to modify a case plan and intensively monitor implementation of the plan, placements, and services. The court must also conduct frequent reviews. Because the case plan is the most critical tool in resolving problems or moving toward permanent separation, court oversight is critical. These **Guidelines** do not, however, propose to authorize the judge to take over the agency's function of developing a plan for the child or of day-to-day decision-making. The judge should not modify the terms of an agency case plan without good reason, based on the specific facts and circumstances of the case. The judge may choose to order a specific placement for the child, thereby usurping specific placement authority from the custodial agency. In these instances, children will be ineligible for Federal foster care matching funds.

A different concern about judicial oversight of case planning is that it might interfere with agency budgeting and organization of services. Frequently alteration by the court of agencies' choices of services, frequency of visitation, placement recommendations, etc., can put a strain on agency resources and staff and circumvent the usual budgetary and priority setting process of the executive and legislative branches of government. State agencies can limit such intervention, at least in part, by adopting legally binding regulations specifying which services they will provide and setting eligibility criteria for the services. In addition, State agencies and court systems can meet regularly to discuss critical service issues.

Tensions related to the scope of court powers to issue specific orders related to placements and services continue. For example, some members of the Expert Workgroup thought that the judge should not be empowered to specify where a child will be placed or what services will be provided because such authority undermines agency discretion.

During the disposition hearing, the judge must explain the proceedings and listen to the parties. If they speak another language, the hearing must be conducted through an interpreter who may also be important when the parents and the worker are developing a plan. It must be recognized, however, that introducing another person into the process may cause some reluctance on the part of parents to discuss their situation. Even with an interpreter some information is lost. Normally, the judge not only hears the verbal response; he or she also

observes the parent's reaction or body language. When there is an interpreter, the judge does not have that extra insight into the parent's perception of what is being said.

27. *Concurrent Reasonable Efforts:* **We recommend that State law authorize the agency to make reasonable efforts to preserve a family concurrently with efforts to ensure that an adoptive or other alternative permanent home will be available if needed by the child.**

Commentary

Concurrent planning means working to reunify a family while, at the same time, planning for the possibility that reunification will not succeed. In those instances where the probability of reunification is low, an agency might seek out foster parents who will be willing to adopt the child should reunification efforts fail. The agency may begin a search for potential adoptive parents while reunification efforts are still underway or might search for and involve a non-custodial parent or extended family in the event that efforts to return the child to the custodial parent fail. These practices are explicitly authorized by ASFA, which provides that "reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts [to preserve the family]." [§101(a), 42 U.S.C. §671(a)(15)(F).]

GUIDELINES FOR REVIEW HEARINGS

28. *Deadline for Review Hearings:* **We recommend that State law require that whenever there is a plan for family reunification, a review hearing should take place 3 months from the date of the disposition hearing and every 3 months thereafter as long as the child remains under the jurisdiction of the court.**

Commentary

A judicial "review hearing" takes place after disposition and provides an opportunity for the court to comprehensively consider the progress of a case. Key purposes of a review hearing are to evaluate progress and compliance with the case plan. The case plan can then be refined to facilitate reunification of the child with parents when possible, eliminate obstacles to achieving a permanent placement of the child, and encourage a rapid pace for achieving permanency for the child. At a judicial review hearing, the court considers the progress of the parties toward achieving the case goal since disposition or the most recent review hearing. The agency generally submits a written progress report, including the latest version of the case plan prior to the hearing.

Federal law requires periodic foster care review at least once every six months, by a court or administrative body. The review is to:

> "... determine the safety of the child, the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement

in foster care, and to project a likely date by which the child may be returned to and safely maintained in the home or placed for adoption or legal guardianship..."
42 U.S.C. §§671(a)(16), 675(5)(B), as amended by ASFA §102(2)(B)(ii).

These **Guidelines** recommend more frequent judicial review hearings. First, judicial review ensures full and fair participation of the affected individuals that the court process provides. Second, review provides an effective system of checks and balances.

Holding judicial review hearings at frequent intervals such as every three months may be instrumental in achieving timely permanent placements for children in foster care. By holding frequent reviews, the judge can identify and resolve disputes and can take steps to eliminate delays in casework and services. The judge can make a more complete record of the agency's efforts to help the family and the parents' response to those efforts. The *Resource Guidelines* say that there should be a judicial review in every case at least every six months, and recommends more frequent reviews as appropriate.

If a State changes its laws to require more frequent judicial review in foster care cases, the legislature should consider both the capacity of the courts to conduct such reviews as well as the agencies' capacity to participate in them, and provide them with the necessary resources to perform this function. (See Guideline 5.) Some States have chosen not to have the courts conduct reviews. The *Resource Guidelines* recommend, as the best alternative or complement to judicial review, review by panels of judicially appointed citizen volunteers. The *Resource Guidelines* also recommend (p. 67) that members of review panels be carefully recruited, trained, and supervised and that each panel of citizens review no more than 100 children. State law should ensure that this or other forms of non-judicial review are coordinated with the court process.

29. ***Review Report:*** **We recommend that State law require that the review report be filed and sent to the parties at least 5 days before the hearing and should prescribe a comprehensive list of issues to be addressed in the report. The format of the report should list each issue, in similar language, as the issues to be addressed in the judicial review hearings' orders and findings.**

Commentary

As with the disposition hearing report, it is very important that the format and content of the agency's pre-review report address the precise issues to be resolved by the court order and set forth in the findings at the review hearing. Agencies and courts should work together to develop standard formats and contents both for agency reports and judicial findings. Both the *Resource Guidelines* and the ABA *Sample Court Rules to Achieve Permanency for Foster Children* demonstrate how to match issues to be included in reports with those to be included in court orders and findings.

The following is a list of topics that State law should require for the review report:

a. Recommendations for the current custody and placement of the child;

b. If return home is recommended, a description of the progress that the parents have made in remedying the causes of placement. There must also be an explanation of why the child will be safe at home and of any proposed conditions to be required of the agency, parents, and other parties and the reasons for those conditions;

c. If applicable, recommended revisions in terms of visitation and child support;

d. If removal or continued out of home placement is recommended, a recommendation concerning whether services should be continued to reunify the family or whether some alternative permanent plan for the child should be adopted;

e. If out-of-home placement with a goal of reunification is endorsed, a recommendation concerning whether it is appropriate to place the child with a foster family willing to provide a permanent home for the child in case reunification is unsuccessful. If such a placement is appropriate, the agency must indicate what steps are needed to secure and stabilize such a placement;

f. Current recommendations, if appropriate, for restraining orders, orders to stay away from the child or residence, domestic violence orders of protection, or other injunctive relief;

g. A statement must show the extent of compliance with the case plan, including a description of the continuing necessity for and appropriateness of the placement. The statement must identify progress toward alleviating or mitigating the causes necessitating placement in foster care, and a likely date by which the child may be returned to the home or placed for adoption or legal guardianship. In addition, the agency must show whether the case plan is designed to ensure that the child is in the most family-like and most appropriate setting and in close proximity to the parents' home, and whether the child's physical, emotional, and educational needs are being met in the current placement;

h. A statement concerning what steps are needed to ensure that the child maintains contacts with his or her own culture; and

i. Proposed revisions in the case plan.

30. ***Admission of Hearsay Reports at Review Hearing:*** **We recommend that State law provide that hearsay reports may be admitted into evidence at the review hearing on the same terms and conditions as reports submitted for disposition hearings.**

Commentary

See the Commentary accompanying Guideline 24.

31. ***Requirements for Review Hearings:*** **We recommend that State law set forth a comprehensive list of actions, decisions, and findings that are to occur at review hearings.**

Commentary

The following is a list of decisions, findings, and actions that State law should require for the review hearing:

a. The court determines the current custody and placement of the child.
b. If a child is returned home without dismissing the case, the court specifies or reconsiders any conditions that will be required of the agency, parents, and other parties.
c. If applicable, the court specifies or reconsiders terms of visitation and child support.
d. In cases where the court decides that a child will be removed from home or will remain outside the home, the court determines whether reunification services will continue to be provided to the family.
e. If the child will be placed in foster care with a goal of reunification, whether the agency will place the child with a foster family willing to provide a permanent home for the child in case reunification is unsuccessful. If such a placement is appropriate, the agency must have a plan to secure and stabilize such a placement.
f. The court may issue restraining orders, orders to stay away from the child or residence, domestic violence orders of protection, or other injunctive relief, as necessary.
g. The court enters findings concerning the extent of compliance with the case plan, including the continuing necessity for and appropriateness of the placement. The court findings must indicate progress toward alleviating or mitigating the causes necessitating placement in foster care, and a likely date by which the child may be returned to the home or placed for adoption or legal guardianship. The court must enter findings about whether the case plan is designed to ensure that the child is in the most family-like and most appropriate setting and in close proximity to the parents' home; and whether the child's physical, emotional, and educational needs are being met in the current placement.
h. The court approves or modifies the case plan.
i. If the child is in foster care, the court reminds parents of their maximum time to make improvements or possibly lose all rights to the child. The court also indicates that, if the parents fail to make good progress prior to the next court review, they may be allowed less than the full time to make improvements. The court questions parents to ensure that they understand the deadline and provides them with a written copy of this warning.
j. At the conclusion of the hearing, the court sets the time and date of the next hearing.

The *Resource Guidelines* and the ABA *Sample Court Rules to Achieve Permanency for Foster Children* list issues to be addressed in review hearings which are consistent with Federal law and the recommendations above. Note the consistency between this list of issues to be addressed in the review report and the list of matters to be decided at the review hearing in Guideline 31. Federal law requires that each administrative review, whether conducted by a court or by an administrative panel, is to determine the safety of the child and the extent of

compliance with the case plan, including the continuing necessity for and appropriateness of the placement. Each review must also identify progress toward alleviating or mitigating the causes necessitating placement in foster care, and a likely date by which the child may be returned safely to the home or placed for adoption or legal guardianship. The review is also to assure that each child has a case plan designed to achieve placement in a safe setting that is the least restrictive (most family-like) and most appropriate setting and in close proximity to the parents' home as described above. [42 U.S.C. §§671(a)(16), 675(5)(A), 675(5)(B).]

32. ***Participation of Foster Parents, Relative Caregivers, and Pre-adoptive Parents:*** **We recommend that State law provide that foster parents, relative caregivers or pre-adoptive parents be provided notice and an opportunity to be heard in any hearing.**

Commentary

Federal law requires that foster parents, pre-adoptive parents, and relative caregivers be given an opportunity to be heard in child welfare cases, as follows:

> [T]he foster parents (if any) of a child and any pre-adoptive parent or relative providing care for the child [must be] provided with notice of, and an opportunity to be heard in, any review or hearing to be held with respect to the child, except that this subparagraph shall not be construed to require that any foster parent, pre-adoptive parent, or relative providing care for the child be made a party to such a review or hearing solely on the basis of such notice and opportunity to be heard.
>
> [ASFA §104(3), 42 U.S.C. §675(5)(G).]

Foster parents or relative caregivers are extremely important to the child, and often possess valuable information and insights that the court should hear directly.

Federal law does not provide foster parents with party status to the proceedings with rights such as calling and cross examining witnesses and initiating proceedings for termination of parental rights. While no State makes all foster parents full parties to child abuse and neglect cases, States have varied policies related to the foster parent's right to formally intervene.

The Expert Work Group did not reach consensus on whether and, if so, when foster parents should be made parties to the proceedings. While many States allow foster parents to become parties under specific circumstances, these laws vary in important respects. Among other things, State laws might allow foster parents to become parties upon their request or give courts discretion about making foster parents parties. State laws might authorize foster parents to become parties after they have cared for the child for a specified length of time or after they have formed close emotional bonds to the child. State laws might grant foster parents party status only at certain stages of the proceedings (e.g., to seek termination of parental rights), or allow foster parents to oppose a child's removal from their home or seek to adopt or become guardians of their foster child.

The main argument in favor of foster parent standing is that foster parents often know the child intimately and are deeply committed to the child's welfare. This is typically the case when

foster parents seek to adopt. As the persons who may be the most concerned and knowledgeable, giving them standing may increase the likelihood of a judicial decision in the best interest of the child.

A common argument against foster parent standing is that when foster parents are competing for long term care of the child, they may be unable to support reunification efforts. Opponents argue that foster parents should not be encouraged to believe that they can interfere with plans to reunify the family and eventually succeed in adopting the child.

GUIDELINES FOR PERMANENCY HEARINGS

33. *Timing of Permanency Hearings:* We recommend that State law require that a permanency hearing be held:

- **a. No later than 12 months after the child was removed from the home and at least once every 12 months thereafter;**
- **b. Within 30 days after the court has determined that the State is not required to provide reunification services for a family following a child's placement into foster care;**
- **c. At the request of a party; and**
- **d. On the court's own motion.**

Commentary

Permanency hearings are post dispositional hearings to decide what type of permanent placement will be chosen for the child. Both the timing and the structure of this type of hearing are important to achieving permanence for the child.

Federal law requires that permanency hearings occur no later than 12 months after the child is considered to have entered foster care. [ASFA, §302(1), (2), amending 42 U.S.C. §675(5)(C).] In addition, in those cases where a court decides that reunification services are not required, the permanency hearing must be held within 30 days of the decision. [ASFA, §101(a), 42 U.S.C. §671(a)(15)(E)(I).]

Note that this Guideline recommends a stricter deadline for permanency hearing than required by Federal law. It recommends that the permanency hearing occur within 12 months after a child actually is removed from the home. This is not the same as 12 months after the child is "considered to have entered foster care," which is the deadline required by Federal law. According to Federal law, a child is "considered to have entered foster care" on the earlier of "the date of the first judicial finding that the child has been subjected to child abuse or neglect" or "the date that is 60 days after the date on which the child is removed from the home." [ASFA, §103(b), 42 U.S.C. §675(5)(F).] Thus, Federal law allows the permanency hearing to occur later than 12 months after the date the child actually was removed from the home.

The majority of the Expert Work Group recommends that the permanency hearing be required within 12 months after the child actually is removed from the home. First, the group

agreed that 12 months after placement was a long enough time period in the life of the child and a workable deadline in which to achieve family reunification. Second, it is difficult to administer the more complex time limit permitted by ASFA.

A minority of the Expert Work Group took the position that State law should reflect the Federal deadline. They noted that under Federal law the 12 months do not begin to run until the court has had time to decide that the child has been abused and neglected but do begin no later than 60 days after entry into foster care. They reasoned that some parents refuse to cooperate with reunification plans until courts have made that decision. If the clock begins to run at that point, this will give the family a full year to make improvements. This also allows for the fact that services provided by agencies are often delayed.

Before the enactment of ASFA, a number of States had already passed legislation requiring permanency hearings within a year of removal from the home. However, many other States need to amend their legislation to substantially transform both the timing and character of these hearings, in order to comply with the new Federal law.

34. ***Consolidated Hearing to Avoid Duplication:*** **We recommend that State law provide that the court may combine, in a single hearing, a determination that reunification services are not required and a permanency hearing, including a decision that a petition for termination of parental rights will be filed.**

Commentary

After a court determines that reunification services are not required, ASFA requires a permanency hearing within 30 days. [ASFA §101(a), 42 U.S.C. 671(a)(15)(E)(i).] One of the decisions that a court may make at a permanency hearing is to order the filing of a petition for the termination of parental rights. [ASFA §302, 42 U.S.C. §675(5)(C).]

In some cases, when the court determines that reunification services are not required, the State will have already decided to seek termination of parental rights and the court will have enough information to support that decision. Therefore, when a court first decides not to require reunification services, the court should be permitted to conduct a permanency hearing in which it might order the filing of a petition for termination of parental rights. Requiring that the permanency hearing be delayed would needlessly delay permanency for the child.

35. ***Decisions at Permanency Hearing:*** **We recommend that State law provide that at the permanency hearing:**

a. The following is the order of priority of permanency goals:

- **Safe return home to a parent or relative at a specific date;**
- **Adoption, by a relative or non-relative, with a specified deadline for filing a petition for termination of parental rights;**
- **Permanent guardianship to an individual or couple;**
- **Another legally permanent placement with a suitable and willing relative; or;**

- **Upon a showing of a compelling reason that priorities 1 through 4 above are not in the best interests of the child, another permanent living arrangement.**

b. **The court will not order a permanency goal if there is another alternative that is higher priority, practical, and in the best interest of the child.**

c. **The court may extend temporary foster care with a continued goal of family reunification no more than two times for up to 90 days each, but only if the parent has made such progress that reunification is expected to occur within 90 days.**

d. **The court may approve continued placement of the child in a residential or group setting for no more than 90 days at a time and only if the child cannot function in a family setting.**

Commentary

Federal law requires that the permanency hearing will determine the permanency plan for the child, including, among other things:

> … whether, and if applicable when, the child will be returned to the parent, placed for adoption and the State will file a petition for termination of parental rights, or referred for legal guardianship, or (in cases where the State agency has documented to the State court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, or be placed for adoption, with a fit and willing relative, or with a legal guardian) placed in another planned permanent living arrangement and, in the case of a child [placed outside the State], whether the out-of-State placement continues to be appropriate and in the best interests of the child, and, in the case of a child who has attained age 16, the services needed to assist the child to make the transition from foster care to independent living…
>
> ASFA, §302, as amended by 42 U.S.C. §675(5)(C).

The Expert Work Group recommends that State law clearly distinguish permanency hearings from review hearings. While review hearings should reevaluate the current plan for the child, permanency hearings should make permanent placement decisions. At a permanency hearing, it should not be sufficient for the court to set a permanency goal for the child. Rather, the court should either order an appropriate permanent arrangement (as in the case of return home) or order the initiation of proceedings to bring about the arrangement (as in termination of parental rights or legal guardianship). In addition, the court should be empowered to order the agency to initiate or join in termination proceedings.

In the list of priorities in this Guideline, "another legally permanent placement with a suitable and willing relative" is lower in priority than return home, adoption, and legal guardianship. Note, however, that both adoption and legal guardianship may be with a relative. Furthermore, in an individual case, placing the child with a relative may be important enough to the child to justify a lower priority permanency option. (See Chapter II, Options for Legal Permanency, Guideline 4.) For example, while adoption is generally preferred over permanent guardianship, sometimes relatives prefer not to adopt. Consider a case in which a particular

relative is the best prospective caretaker, the relative is fully committed to raising the child, but the relative has convincing reasons for preferring not to adopt the child. In this case, selecting the relative as guardian is consistent with this Guideline.

36. *Permanency Hearing Petition, Motion, or Report*: **We recommend that State law require that a petition, motion, or report be filed and sent to the parties at least 5 days before the permanency hearing and should set forth a list of issues to be addressed. The petition, motion, or report should address each issue, in similar language, that must be addressed in permanency hearing orders and findings.**

Commentary

The permanency hearing must be structured carefully to yield a permanent placement decision for the child. This Guideline is designed to encourage the agency to engage in a systematic thought process, carefully considering different options for permanency in the order of their priority. As is the case with disposition and other reports to the court, the agency report for the permanency planning hearing should address each issue in language similar to that of the court's findings and orders. The following is a list of topics that State law should require for the permanency hearing petition, motion, or report:

a. Recommendations for a permanent goal for the child, including the reason for the choice of permanent placement and steps to be taken to ensure the safety and stability of the permanent placement;
b. Where applicable, a statement of compelling reasons why every higher priority permanent placement was not in the best interests of the child;
c. If the agency recommends that the child be returned home, a statement of reasons why the child can safely return home, a suggested date for the child's return, and, if applicable, a plan for safeguarding the child at home;
d. Where the recommended goal is neither returning the child home on a specific date nor filing a petition for termination of parental rights, a statement of one or more compelling reasons why termination of parental rights is not in the best interests of the child;
e. If the agency recommends an extension of temporary foster care with a continued goal of family reunification, an explanation of the parent's substantial progress toward reunification and why reunification is likely to occur within 90 days; and
f. If the child is permitted to remain in a group or institutional setting, a statement of compelling reasons why the child cannot function in a family setting and what steps should be taken to prepare the child to be placed with a family.

For other similar recommendations for permanency planning hearings, see the *Resource Guidelines* and the ABA *Sample Court Rules to Achieve Permanency for Foster Children.* Note that the requirements in this Guideline are in several respects stricter than those required by Federal law. Under Federal law, at the permanency hearing a court may approve a permanent placement arrangement other than return home, adoption and termination of parental rights, or guardianship. The court may only approve an alternative arrangement if the agency has documented compelling reasons why the specified arrangements or placement with a relative would not be in the child's best interests. [ASFA, §302, as amended by 42 U.S.C. §675(5)(C).]

This Guideline requires the agency to provide additional documentation of compelling reasons, including reasons why *every* higher priority placement option was not recommended. For example, if adoption is recommended, the agency must document why the child cannot safely be returned home. Paragraphs b, d, and f require the agency to explain in its report why higher priority permanent placement arrangements are not in the best interests of the child.

37. *Requirements for Permanency Hearings:* We recommend that State law set forth a comprehensive list of actions, decisions, and findings that are to occur at permanency hearings. The court's order and findings should set forth and explain a specific permanency plan. The findings should set forth compelling reasons why each higher priority permanency option for the child (as listed in Guideline 35) was not selected.

Commentary

The main task of a permanency hearing is to determine the permanent goal for the child. A secondary, but also important, task is to specify what steps are to be taken to achieve the permanent goal. If a low priority goal is selected, the court should explain the reasons for its decision. If the court sets a permanency goal of adoption or guardianship, a petition for termination of parental rights or for guardianship must be filed and heard. State statutory grounds must still be met in order to implement the permanency plan.

The following is a list of decisions, findings, and actions that State law should require for the permanency hearing:

a. The court will determine the child's permanency plan and specify the steps to be taken to ensure the safety and stability of the permanent placement.
b. Where applicable, the court will state compelling reasons why higher priority options were not practical.
c. If the court requires that the child be returned home, the court will specify a date for the child's return, will enter findings stating why the child can safely return home, and, if applicable, will approve or modify the agency's plan for safeguarding the child at home.
d. If the child is to be placed for adoption, the court will order the filing of a petition for the termination of parental rights within 30 days.
e. If the child is to be placed in legal guardianship, the court shall direct the filing of a guardianship petition.
f. If the child is to be kept in temporary foster care with a continued goal of family reunification, the court will allow only up to two extensions of temporary care up to 90 days each. The court will enter findings describing the parent's substantial progress toward reunification and explaining why reunification can occur within 90 days.
g. If the child is permitted to remain in a group or institutional setting, the court will enter findings stating compelling reasons why the child cannot function in a family setting and will evaluate the agency's plan to prepare the child to be placed with a family.

Where the court decides that the child is to be placed for adoption, paragraph d requires the court to order the filing of a petition for the termination of parental rights within 30 days. Filing the termination petition within this time fulfills the ASFA requirement of either filing or joining a petition for termination within 15 months after the child is considered to have entered foster care. If a termination petition is not filed within this time, the agency must document to the court compelling reasons why termination of parental rights is not in the best interest of the child. [ASFA §103(a)(3), 42 U.S.C. §675(5)(E).] Note that the agency may be excused from filing a petition to terminate parental rights within the 15-month deadline if the State fails to provide services to preserve the family in accordance with the agency's case plan and the agency considers the services necessary for the child's safe return home. In addition, the agency may be excused from seeking termination if the child is being cared for by a relative (if the State elects this exception).

GUIDELINES FOR POST-TERMINATION COURT REVIEW

38. ***Timing of Post-Termination Review Hearings:*** **We recommend that State law require post termination review hearings to be held every 3 months as long as the child remains under the jurisdiction of the court.**

Commentary

In many parts of the United States, much needless delay occurs in the placement of children who have legally been freed for adoption. Frequent judicial review, where conducted by capable and specially trained judicial officers, can help secure the placement of children into new permanent homes and/or expedite the finalization of permanency arrangements with foster parents or relatives.

39. ***Requirements for Post Termination Review Hearings:*** **We recommend that at a post termination review hearing, State law require that the court address current progress in placing the child in an adoptive home or other permanent placement. It should also require that the court identify barriers to such placement, enter appropriate orders to facilitate the timely permanent placement for the child, and determine whether the State has made reasonable efforts to arrange and finalize the child's permanent placement.**

Commentary

Hearings following the termination of parental rights should be structured to ensure a thorough and intelligent inquiry into the steps being taken to achieve and secure the child's adoption. The ABA *Sample Court Rules to Achieve Permanency for Foster Children* include proposed rules for post termination review hearings. (See Rules 87-90 and accompanying commentary.) These **Guidelines** recommend requiring the court, at the conclusion of a termination of parental rights trial, to schedule the post-termination review.

Once the permanency plan is changed from reunification, Federal law requires reasonable efforts to finalize the permanent placement of a child as a condition of Federal financial participation. "If continuation of reasonable efforts ... is determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the child." [ASFA, §101(a), 42 U.S.C. §671(a)(15)(C).] (See Chapter III, Reasonable Efforts to Preserve Families and Achieve Permanency for Children.)

APPEALS

40. *Guidelines to Expedite Appeals:* **We recommend that State law establish specific guidelines to expedite appeals in child welfare cases. These guidelines should include setting a short deadline for notice of appeal; setting short deadlines for preparation of transcripts and records for appeal; setting a special tight briefing schedule; and setting time limits or guidelines for deliberations and issuance of decisions.**

Commentary

While appeals necessarily require great care and deliberation, they can lengthen significantly the time a child must remain in foster care. It inevitably takes time to prepare and review the record, to prepare and submit briefs, to hear arguments, to perform legal research, to deliberate, and to prepare a written decision. Nevertheless, there are a number of specific ways in which appellate delay can be significantly reduced without seriously compromising the quality of the appeal. Among these are measuring and tracking the progress of appeals; shortening deadlines for initiating appeals; providing additional resources for the speedy preparation of the transcript and record; shortening deadlines for completion of the transcript and record; streamlining and shortening the briefing schedule; setting oral arguments at an earlier time; and setting and adhering to a tight schedule for deliberation and for preparation and completion of the court's opinion.

The ABA *Sample Court Rules to Achieve Permanency for Foster Children* include proposed rules to shorten appeals of child welfare cases. A number of State court improvement projects are addressing this issue. State legislatures should fund technical assistance and training for appellate judges concerning appeals in child abuse and neglect cases. Such technical assistance and training should include expeditious docketing and tracking of appeals and the developmental needs of abused and neglected children.

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CHAPTER V: NON-ADVERSARIAL CASE RESOLUTION

INTRODUCTION

Professionals who work with children and parents have become increasingly dissatisfied with the customary reliance on the traditional adversarial system in resolving family-related disputes, including cases involving children's protection, placement, and permanent care. The power struggle in contested child welfare-related cases and hearings may foster hostility among the parties and dissipate money, energy and attention that could otherwise be used to solve problems cooperatively. Parties may become polarized, open communication may be discouraged, and there may be little investment in information sharing and joint problem solving. Children may suffer when adversarial tensions escalate and ameliorative services are delayed.

The adversarial system is, however, essential and well-suited to resolving conflicts when differences regarding the true facts of a child abuse or neglect case, or the differing views of the proper response to a family's child protection-related problems, are irreconcilable. Nonetheless, most child abuse and neglect cases are resolved through informal settlement negotiations. Unfortunately, these settlements are often quickly made in courthouse hallways where the interests of all parties may not be carefully or fully considered. Hastily made agreements or stipulations made immediately prior to a hearing can do a disservice to both children and their families.

Non-Adversarial Case Resolution (NACR) has become an accepted alternative to the traditional adversarial processes of the courts. It has also been widely adopted to resolve conflicts within government agencies and elsewhere. Surveys of court improvement projects indicate that one of the most popular reforms identified by the States is the use of alternative forms of dispute resolution. (See *Summaries of Twenty-Five State Court Improvement Assessment Reports,* National Council of Juvenile and Family Court Judges, March 1998.)

The **Guidelines** do *not* include certain court-based approaches to avoid lengthy and contested case proceedings, including pre-trial case settlement and case status conferences. Such procedures can be established through court rules, and they do not require authorizing legislation or special funding for their establishment as a regular part of the judicial process in child abuse and neglect-related cases. Courts should be encouraging resolution of contested matters through pre-trial hearings that narrow the issues in contention. Courts may also find the use of special masters or magistrates for this purpose helpful in speeding case resolutions.

These **Guidelines** focus on two forms of NACR that could be authorized and supported by legislative action: Mediation and Family Group Conferencing. A related practice, relinquishment counseling, does not require legislative authorization but will be discussed briefly because it is often a component of both Mediation and Family Group Conferencing.

Mediation in the child welfare context is well established in many jurisdictions. It is commonly defined as "an intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no authoritative decision-making power but who assists the disputing parties in voluntarily reaching their own mutually acceptable settlement of disputed issues in a non-adversarial setting." Mediation is widely used today in domestic relations custody disputes between parents, and is increasingly found in many juvenile delinquency, juvenile status offender, and child welfare proceedings. Mediation in the child welfare context has existed in Los Angeles and Orange County, California, and Connecticut since the mid-1980's. As of September 1998, Mediation programs are operating in approximately fifteen California counties, as well as in Connecticut, Utah, the District of Columbia, and in certain jurisdictions within Florida, Texas, Kentucky, Hawaii, and Ohio. In addition, Arizona, California, Colorado, Delaware, and Florida have State legislation authorizing the use of Mediation in child welfare-related cases.

The National Council of Juvenile and Family Court Judges' *Resource Guidelines* suggests that Mediation in child welfare legal cases:

- Involves discussions facilitated by one or more court-appointed, neutral, highly skilled and trained third party mediators, involving all relevant case participants and attorneys at some point during the Mediation;
- Always focuses on preserving the safety and best interests of the children (and the safety of all family members), while simultaneously attempting to validate the concerns, points of view, feelings, and resources of all participants, especially family members;
- May occur at any stage in the history of the case. Typically the earlier it occurs once the most significant case information is available, the better;
- Can be used to resolve a broad range of disposition and postdisposition issues as well as certain jurisdictional issues;
- Serves to orient and educate family members, clarify issues, facilitate exchange of the most current case information, and creatively intervene to resolve roadblocks to case resolution;
- Should be confidential with exceptions limited to new reports of suspected child abuse and neglect, and threats to harm self or others;
- Usually results in agreements which should become part of the court record;
- Seeks to leave family members with an experience of having been significant, respected, and understood participants in the court process, with an investment in accepting and complying with the terms of the resolution and/or decisions of the court;

- Serves to reduce the degree of animosity held by family members toward "the system" and focuses the family's energy instead on child protection and parenting related issues.

Resource Guidelines, pp. 133-138.

Family and juvenile courts recognize that the adversarial process in child abuse and neglect cases can sometimes break down communications and create hostility, divisiveness, and rigid position-taking between participants, most notably between the parents and the child protective agency and/or the child's attorney. Mediation, on the other hand, brings all significant case participants together in a nonadversarial and problem-solving setting. (Edwards, L.P., & Baron, S., 1995, "Alternatives to Contested Litigation in Child Abuse and Neglect Cases." *Family and Conciliation Courts Review,* 33, 275-285.)

One of the most extensive evaluations of child welfare-related Mediation, completed in 1995, was an examination of programs in five California counties. The evaluation demonstrated the following characteristics of Mediation.

- Mediation can produce settlements at all stages of cases.
- All types of cases can be settled in Mediation, and there was no evidence to support blanket screening-out of certain types of cases.
- Widespread support existed for mediating both jurisdictional and dispositional case issues, although time constraints posed problems in doing both.
- Parents reported that Mediation gave them a place to be "heard" and to better understand what was required of them.
- Agreements produced in Mediation were similar to outcomes promulgated by judges. The former were more likely, however, to include detailed visitation plans for children in out-of-home placement, were more likely to address communication problems between family members or between the family and the child welfare agency, and were more likely to result in parents specifically acknowledging the need for services.
- Mediated contested cases were less likely than non-mediated contested cases to result in later contested hearings.
- Mediated settlements enjoy greater compliance by parents—at least in the short-run.
- A variety of Mediation models proved effective.

(Thoennes, N., & Pearson, J., 1995, "Mediation in Five California Dependency Courts: A Cross-site Comparison," Report to the California State Legislature, Denver, Colorado Center for Policy Research. Thoennes N., 1997, "An Evaluation of Child Protection Mediation in Five California Courts," *Family and Conciliation Courts Review,* 35, 184-195.)

Family Group Conference is a fairly new form of NACR that focuses on engaging the extended family in planning for a child and does not necessarily involve the mediating of disputes. It is a promising NACR model that has been recently imported to the U.S. from New

Zealand. Family Group Conference, whether it takes the form of Family Group Decision-Making or a Family Unity Meeting, is characterized as a family-focused, strengths-oriented and community based process where parents, extended family members, and others come together to collectively make key decisions for children involved in the child welfare system. (Lisa Merkel-Holguin, *Putting Families Back into the Child Protection Partnership: Family Group Decision-Making,* Protecting Children, American Humane Association, Summer 1996.) Family Group Conference is often administered by the child welfare agency as authorized by Oregon statute, but could also be a form of court-approved NACR as described by Lowry. (See Lowry, *Family Group Conferences as a Form of Court-Approved Alternative Dispute Resolution in Child Abuse and Neglect Cases,* 31 U Mich. Journal of Law Reform 57, Fall 1997.)

The following principles and values characterize Family Group Conferences.

- Children are best raised in families
- The primary responsibility for the care of children rests with their families, which should be respected, supported and protected.
- Family groups can make safe decisions for their own children. Families have strengths and can change.
- Family groups are experts on themselves. Families have wisdom and solutions that are workable for them.
- The essence of family empowerment is the belief in self-determination: Those we help have a right and need to be free in making their own decisions and choices.

(Lowry at 66; See also, Elizabeth Cole, *Key Policy Decisions in Implementing Family Group Conferences: Observations Drawn from the New Zealand Model,* in Hardin, Family Group Conferences in Child Abuse and Neglect Cases: Learning from the Experience in New Zealand, ABA Center on Children and the Law, 1996.)

The Family Group Conference process comprises four main parts. The first is the Referral, in which a coordinator or gatekeeper decides whether to hold a conference. The second is the preparation and planning. The third is the Conference itself, which is generally divided into four stages of welcome, information sharing, family meeting, and decision. The fourth is writing, distribution, and implementation of the plan. (Lowry 66-76; Merkel-Holguin, p. 5-7.)

There are two primary differences between the Family Group Decision-Making (FGDM) and Family Unity models (FUM). FGDM discourages the practice of excluding any family members from the meeting, while the FUM permits parents to veto the participation of any family member, a practice that provides parents with more control over the process and with whom information will be shared. The second major difference is that the FUM model allows professionals and support persons to be present during the family discussion, while a key tenet of FGDM is that families, once briefed by the professionals, must have a private family meeting without the presence of any nonfamily persons.

Oregon statute, ORS 417.365 to 417.375, authorizes family group conferences which are generically referred to as "Family Decision-Making Meetings." Kansas legislation, Kan. Stat. Ann. §38-1559 (Supp. 1996), authorizes such meetings as "Family Conferences." Family Group Conferences are also being held in Santa Clara County, California and Grand Rapids, Michigan, and other jurisdictions.

Voluntary relinquishment counseling is an underutilized child welfare NACR that should receive special attention and may be employed as part of Mediation or Family Group Conferencing or may occur separate from these mechanisms. Many professionals believe that it would be helpful for parents and children alike if parental counseling concerning the voluntary relinquishment of parental rights was readily available. Voluntary relinquishment can be more humane than contested termination proceedings by avoiding some trauma to parent and child. It can also avoid delay. In many cases, voluntary relinquishment of parental rights is preferable to contested termination because it reduces the financial, emotional and time costs.

The use of NACR in the voluntary relinquishment process may also *add civil liberty protections* to the birth parents when compared with more common methods of working with birth parents on parental rights termination issues. Parents may, by participating in NACR, be more likely to feel that those within the "system" are consciously protecting their rights, rather than simply coercing them to "give up" their rights to their child. Also, where voluntary relinquishments are not made within the court, making them within an NACR process could provide protections to parents that are similar to those that should be provided to parents within more formal termination of parental rights proceedings.

As recommended elsewhere in these **Guidelines,** parents should be aware of the possibility of voluntary relinquishment at all stages of the court process. (See Chapter VI, Termination of Parental Rights.) Voluntary relinquishment will be more attractive if options for permanency, such as adoption with contact, are available under State law as recommended by Chapter II, Options for Legal Permanency. Some parents will be more willing to relinquish parental rights if they can ensure that their child will be adopted by someone of whom they approve. Subject to the court finding that it is in the best interests of a child, State law should permit parents involved in child protection proceedings to voluntarily relinquish their child for adoption by specified persons to the same extent that so-called direct-consent adoptions are permitted for other birth parents. Relinquishment under State law is generally of two types. In one type, often called surrender, the agency determines who the adoptive parents will be—subject to court approval. The other type involves direct or specific consent, in which the parents are allowed to relinquish the child to a designated individual—also with court approval.

An amicable relationship between birth parent and new parent is also more likely under these circumstances. Further, if more contested terminations of parental rights could be converted into voluntary relinquishments, States would save considerable time and expense. Some voluntary relinquishment programs have involved elements of Mediation, including the possibility of formal agreements concerning future contact between the birth parent and child. In such processes, parents' legal rights should be carefully protected. Parents should be legally

represented, even though their lawyer might not participate in each stage of the relinquishment counseling or Mediation.

Both Mediation and Family Group Conferences are alternatives to traditional adversarial/litigative case approaches and help divert children and families from the child welfare and court system while engaging parents in a non-threatening situation. NACR may enable parents who have been inappropriately denying or minimizing the impact of the children's abuse or neglect to safely acknowledge responsibility for the mistreatment and to willingly accept help. Parents can, within the NACR process, be *given choices* of methods to solve the problems they and their children face. The informal and participatory setting of NACR can facilitate this problem-solving approach. Everyone benefits if disputes can be resolved earlier in the process when a child has been identified as abused or neglected.

The advantages to using NACR in child welfare cases include:

- Sharing of responsibility for child protection beyond the child welfare agency and the courts—to include the child's immediate family, the child's extended family, and the child's community;
- Empowering parents in the decision-making process related to their children;
- Helping assure that, in addition to parents, others with a strong interest in abused and neglected children are heard within the process of intervention;
- Facilitating parental compliance with agency case plans;
- Avoiding conflicts and delay, especially those harmful to children, which are associated with the adversarial process;
- Reducing crowded judicial case dockets; and
- Circumventing the need for expensive, lengthy contested trials and case review hearings.

Several unique factors should be considered whenever NACR is considered for a child welfare-related matter. First, those involved with the process must remember that the *safety of children must never be compromised or endangered* through the use of any nonadversarial case approaches. Second, parents who participate in the NACR process must be *competently represented* in order to compensate for the potential power imbalance that can exist when government is intervening in a family's life. Third, NACR—if done properly within child welfare proceedings—*will not be inexpensive*.

As discussed below, programs must have adequate funding for properly trained mediators or family-group facilitators who can resolve cases in a timely manner.

Non-adversarial case resolution approaches could be used throughout the child protection process, both *before* and *after* court intervention becomes necessary. Different forms of NACR can be useful at any stage of State intervention to protect children, from the initial identification of abuse and neglect through the final permanent placement of a child. The earlier in the process that NACR is implemented, the greater its chance for success. The adversarial process can create

great harm and extensive delays in resolving cases. The NACR process has the potential for being concluded much more quickly. The NACR process, however, should not "stop the clock" on the mandatory permanency time lines in child welfare court cases as imposed by Federal and State law.

It is still early in the development of these alternatives, so no single approach to NACR in the child welfare context should be statutorily imposed on an entire State. There are a variety of such methods, each of which is worthy of further testing and evaluating. Unfortunately, in most jurisdictions, none of these formal, structured opportunities for non-adversarial case resolution—at both the child welfare agency and court levels—have been available. Thus, these **Guidelines** encourage the development of non-adversarial case resolution approaches through the enactment of authorizing legislation and support to the implementation of ongoing evaluation of results.

GUIDELINES AND COMMENTARY

1. *Authorize NACR.* We recommend that State law authorize various forms of non-adversarial case resolution (NACR) to be used by child welfare agencies and the courts.

Commentary

Laws should authorize various forms of NACR in child welfare cases including formal Mediation, Family Group Conferencing, and relinquishment counseling. Judges and child welfare agency directors should lead in encouraging and implementing such programs. However, legislatures should not look at NACR as a way of avoiding making fundamental improvements in both the child welfare agency and juvenile court system. NACR *is a tool* for these systems but not a substitute for the fundamental reforms necessary for a fair and effective court process and a child welfare agency with adequate resources.

NACR is generally more expeditious and efficient than traditional litigation and can often resolve disputes without the hostile overtones characteristic of the court's adversarial process. When children are endangered, their extended families may provide invaluable resources to help fashion safe and permanent case resolutions. NACR in the child welfare context should be structured to involve the parents and the child's extended family in responsible planning and decision-making for the child. Use of various forms of NACR can provide clients with the opportunity to vent, disagree and be heard, and to understand the points of view of others. Evaluation of NACR programs in various States and locales shows:

- Production of better and longer lasting resolutions of child protection cases;
- Parent participation in the child protection problem-solving process;
- Professionals hear first-hand from parents and family members;
- Resolution of personal conflicts within the family and between the family and social worker;

- Identification and mobilization of family strengths; and
- Diffusing of animosities the family may have towards the system.

Additionally, family members often feel more comfortable raising the cultural, ethnic, or religious needs of the child in the more informal NACR process.

2. ***Child's Needs Paramount.*** **Child safety, permanency and well-being are the principal goals of NACR and we recommend that State statutes and child welfare agency policies and court rules ensure that NACR programs are structured accordingly. NACR should not delay the resolution of cases nor create additional trauma for the child and family. NACR should empower parents and promote shared responsibility with the extended family and community to serve the best interests of the child effectively and more promptly.**

Commentary

The principal goal of NACR in the child welfare context is to assure the safety and protection of children through resolution of disputes without having to rely on the traditional adversarial court process. NACR should also focus on child well-being and permanency, family empowerment, and community involvement in the process.

The greatest fear among critics of NACR in these cases is that child safety will be compromised or sacrificed during the process. Proponents and critics of such processes agree that child safety must never be sacrificed in the interests of reaching agreement or as part of any "plea bargains." Concerns about children being endangered through the use of NACR can be alleviated in several ways. First, NACR must assure that the child's "voice" is clearly heard within the process, either through the child him/herself, by the child's legal representative, or both. Second, NACR must permit the child's representative, the convenor/facilitator/mediator, or others to *veto* any agreements reached through the process. Third, NACR should provide for an independent review of any mediated agreements, stipulations, or settlements by judges and child welfare agency supervisors. Fourth, NACR should structure more frequent involvement by protective family members during the Mediation processes and within mediated agreements.

For NACR to work in a timely fashion, it should be initiated promptly and—ideally—a decision should be reached within 30 days of its initiation. In emergency situations, it should be completed even sooner. The NACR process should clarify how any agreement will be enforced and what will happen if and when the agreement fails. In addition to being ever-conscious about the child safety issues in mediating case resolutions, those involved within the NACR process must constantly think about how the process, and its outcomes, will promote permanency for the child.

3. ***Available for All Stages and Issues.*** **We recommend that NACR techniques be available at all stages of the child welfare agency and court process. It should also include all family members (with limited exceptions, and with specialized protocols**

being developed for dealing with sexual abuse and domestic violence issues), and be permitted to address a broad range of issues within both the child welfare agency and court process.

Commentary

NACR techniques can be fairly and effectively used at *all stages* of the child welfare intervention process. NACR should be available prior to the filing of a court petition and throughout the legal process, up to and including relinquishment or termination of parental rights, adoption, and guardianship. In the court process, settlements are typically presented to the court and, if approved, entered as fully enforceable court orders. Proponents of NACR in child welfare cases have seen it used successfully to help expedite adoptions and guardianships for severely abused or neglected children.

NACR can be used in various ways, each of which should be separately considered by State legislatures and other policy makers. Both Mediation and Family Group Conferences can be used:

- To resolve conflicts between *child welfare agencies and parents* concerning proposed case plans and final case resolutions, to help divert cases from the court system, and to work out disputes over a child's supervision, placement, visitation, family reunification, and permanent plans for the child (e.g., mediated relinquishment of parental rights or guardianship, as well as facilitation of cooperative adoption agreements where appropriate and permitted by law); and
- To increase intra-familial involvement among *parents, relatives, and other extended (kinship) family members* in fashioning case resolutions and improving cooperation and coordination with government child protection and child welfare authorities.

Mediation can be used:

- To resolve conflicts among *substitute care providers, foster care caseworkers and case reviewers, and children's court-appointed advocates* about the needs of children during periods of substitute care; and
- To resolve matters more promptly as part of the court process among the various *attorneys and other advocates, caseworkers, therapists, other involved professionals, and the parents and other family members* in child protection judicial proceedings. Mandatory case Mediation facilitated by a trained independent mediator can help focus attention on collaborative problem solving on behalf of the child.

Legislation or policies should not impose blanket exclusions of any parties or types of cases from NACR. Some State laws currently exclude a few types of cases from eligibility for Mediation. The Expert Work Group, however, identified various types of cases, even cases involving sexual abuse and domestic violence, which benefited from NACR. For example, in

sexual abuse cases where a mother might feel threatened by litigation against her for "failure to protect" her child from the abuse, involving her in NACR could help achieve quicker agreement to a plan keeping the perpetrator away from the child, thus protecting the child's safety. In child protection cases where there has also been domestic violence in the home, the battered mother may be empowered through the NACR process to take better control of her life and the protection of her child. A very inclusive process is recommended, which does not bar any type of case or person, even though on a case-by-case basis some persons may be excluded (where NACR is not appropriate for all cases or for all family members).

On occasion, and where appropriate, children will be involved in the process, especially if they are older and reasonably mature. Exposure of children to NACR can help them recognize that their immediate families and relatives are truly interested in their welfare and that their own concerns are taken seriously.

The NACR process must not be delayed by strategic litigation concerns. The permanency timelines of Federal and State law must be met and delays in the formal process avoided. For example, cases involving the abuse or neglect of a child, in which criminal charges are pending against a parent/party, should not have Mediation delayed because the related criminal matter has not yet been resolved.

Any interested person should be authorized to request NACR in any child welfare case. To avoid trivial issues taking up valuable time within NACR, court or agency gatekeepers or facilitators of these processes should initially explain the ground rules to participants and indicate how matters inappropriate for resolution within NACR can be separately addressed. Because a family group conference is more logistically complex and time consuming than Mediation, the gatekeepers may be more cautious in convening the FGC. Some important questions must be addressed in any NACR program implementation. For example, do the parents have the right to consent, or opt out of, the convening of a Mediation or Family Group Conference process? Who should be considered "family members" or other "interested persons" and therefore invited to participate? Should the coordinator or facilitator of the process have authority to exclude certain family members, such as those believed to be intimidating the child or other family members? Should there be mandatory timetables for convening/completing the NACR process?

4. ***Facilitate and Evaluate Pilot Projects.*** **We recommend that State law and process facilitate the development of child welfare-related NACR models in local jurisdictions—including pilot projects in case Mediation, Family Group Conferencing, and relinquishment counseling. Well-trained and competent persons should staff NACR programs. State law should also require that programs be evaluated for outcome, including child safety and well-being, permanency, and family empowerment.**

Commentary

NACR cannot be implemented without well-trained and qualified staff who have had adequate preparation. Most programs even require preparation. Although these costs may be

significant initially, they should soon be offset by the *cost savings* achieved through NACR. For example, there may be a reduction in the number of children in expensive out-of-home care and a decline in the number of adversarial court hearings that take up the considerable, and expensive, time of professionals.

To assure that all parties consider it an objective process, mediators should be independent of the child welfare agency or the judge, even though the child welfare and court system must coordinate in the execution of these processes to ensure NACR is effectively implemented. Community child protection systems, including judges, child welfare agency representatives, attorneys, and child advocates, should meet regularly to discuss the creation and maintenance of NACR programs. Legal representatives for the child should be available to participate in all phases of NACR, and both children's and parents' legal or other representatives should be involved in the planning of NACR programs.

Hiring competent program coordinators, facilitators, or Mediation supervisors is a critical factor in NACR program success. Persons with this responsibility—especially those working with cases serious enough to have warranted court intervention—should already be trained mediators, be experienced child welfare professionals, or have other special skills appropriate for directing such initiatives.

Certification standards for NACR staff should be established. NACR personnel should be trained in dispute resolution generally and on issues relevant to the child welfare NACR process. The training should include information on child abuse and neglect, child development, domestic violence and its impact on children, substance abuse, family functioning and family systems, power imbalance concerns in mediating child welfare cases, working with diverse communities, and access to community resources. Because these are highly transferable skills, many in the community may want to be trained as mediators. All trainees should be monitored by more experienced NACR experts. Trainees should observe others in action.

Because of the relative newness of NACR and because it is in the process of development, careful and scientifically sound evaluations are needed. Evaluators should describe how particular NACR programs are implemented, their impact on outcomes for children, and their effect on agency and judicial costs.

5. *Technical Assistance Available.* We recommend that technical assistance be available to State and local child welfare agencies and courts to support the development and maintenance of effective NACR.

Commentary

Starting an NACR program is a complex process. State legislatures should encourage State and county child welfare agencies, as well as State supreme courts and administrative offices of the courts, to develop and access technical expertise that can help local agencies and courts implement and maintain NACR techniques. Resources will help courts learn about

NACR alternatives in child welfare cases and which NACR approaches appear to be most effective in which situations.

6. ***Confidentiality.*** **We recommend that State law ensure that statements made within the NACR process are confidential and will not be admissible in any court proceedings. An exception should be Statements giving rise to new allegations of child abuse or neglect that are subject to mandatory child abuse and neglect reporting laws, or any threats of harm to self or others.**

Commentary

Frank and open discussion of all relevant issues is essential to the success of NACR. The confidentiality provisions are intended to promote the free and unreserved discussion and sharing of information. Statements made in the NACR process should be treated as if they were statements made in the course of settlement discussions. Even when there is only partial agreement on the issues, the substance of the NACR discussion should not be used in the court process. When Mediation is unsuccessful, neither the mediators or other participants in the process should testify against any party in court nor should any product of the Mediation be used in court, including whether in the mediator's opinion one party cooperated or failed to cooperate. (*Resource Guidelines* of the NCJFCJ, p. 137.)

7. ***Sharing Information.*** **We recommend that legislation and policy permit the appropriate disclosure of otherwise confidential information among participants in the NACR process.**

Commentary

Legislation should ensure that information about the child and family can be shared with members of the extended family during the NACR process as appropriate but that those receiving such information have a duty to treat it in confidence. Relevant information about the child, parents, and other family members is likely to be known only to certain individuals directly involved in child welfare agency or court actions related to the child. Ideally the persons affected would voluntarily release such information for purposes of NACR but, especially when the court mandates NACR, the voluntary cooperation may not be forthcoming. If such information is withheld, the type of shared decision-making that is critical to successful NACR may be impossible.

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CHAPTER VI: TERMINATION OF PARENTAL RIGHTS

INTRODUCTION

Termination of parental rights permanently ends the legal parent-child relationship. After parental rights have been terminated, a child may be adopted without parental consent. Termination may be voluntary, based on the informed consent of the parent, or, termination may be involuntary, following court proceedings brought against the parent.

Severing of the parent/child relationship is a profoundly serious matter, but it is essential legally to clear the way for adoption. Parental rights are rightly cloaked in constitutional protections and should not be terminated without full and careful due process of law. State law should allow parental rights to be terminated only when it is clearly necessary to ensure safe and permanent homes for children.

Yet, termination is an appropriate remedy for many children caught up in the foster care system. Once it becomes clear that a foster child cannot safely return home, termination of parental rights usually is required. Most foster children unable to return home should be adopted, and adoptions require termination of parental rights.

While these **Guidelines** recommend that States improve legal permanent placement options not requiring termination of parental rights, termination will remain appropriate for most children unable to return home. Most children unable to return home require new families in which the parents, through adoption, will have complete and undivided legal responsibility for the care of their children. Transferring complete parental responsibility to the adoptive parents requires that all rights of the children's birth parents be ended.

There are sharp differences among State laws governing termination of parental rights. In some States, termination statutes are themselves a significant barrier to securing permanent and safe homes for abused and neglected children. A State may have limited grounds for the termination of parental rights. Where statutory grounds for the termination of parental rights are overly narrow or unclear, agencies sometimes do not seek termination and judges do not grant it even when it is clear that a child should be adopted. Because of flaws in termination statutes, public child welfare agencies and courts are sometimes unable to pursue adoption when they should, thus leaving children in limbo and causing them to suffer further unnecessary emotional loss.

Problematic statutory language may not be the main barrier to appropriate and timely termination of parental rights, however. If termination of parental rights is often unnecessarily delayed or denied, States are encouraged to review possible causes *other than the language of the statutes.* For example, services to parents that could make it safe for a child to return home may be delayed, agencies may have insufficient resources and staff to deliver the necessary services, or agencies may lack adequate legal staff to prepare and process legal documents, including petitions to terminate parental rights. Courts may be backlogged due to an inadequate number of judges or court staff. Judges, attorneys and caseworkers may lack proper training on

termination standards and procedures, and termination may be denied because caseworkers or judges falsely assume that certain children cannot be adopted.

GUIDELINES AND COMMENTARY

GUIDELINES FOR VOLUNTARY RELINQUISHMENT

1. ***Opportunity to Execute Voluntary Relinquishment:*** **We recommend that State law and policy ensure that parents are given an opportunity to execute a voluntary relinquishment of parental rights at all stages of the court process.**

Commentary

Public child welfare agencies rely more heavily than may be necessary on involuntary judicial termination of parental rights to make adoption possible for foster children. In many cases, the possibility of voluntary relinquishment of parental rights should be more extensively explored.

Voluntary relinquishment of parental rights refers to a situation in which a parent agrees to give up all rights to a child. After voluntary relinquishment, a child can be adopted without further notice to the parent. Voluntary relinquishment is generally more humane and preferable to involuntary termination of parental rights. First, when parents agree to give up parental rights, an older child may have an easier time adjusting to the new adoptive home. That is, by giving permission for the child to be adopted, parents may make it possible for the child to accept the new home and to do so without guilt or a sense of divided loyalty.

Second, when parents relinquish their rights, they do not suffer the stress of the adversarial trial for involuntary termination of parental rights. At an adversarial trial, parents are forced to hear detailed testimony concerning their maltreatment of the child and how the child has suffered at their hands. Discussions of voluntary relinquishment, by contrast, encourage parents to be constructively involved in planning for their children.

Third, the child can be placed in a permanent home at an earlier time. By avoiding all the steps associated with a trial as well as the significant possibility of a prolonged appeal, the child's stay in foster care is shortened.

Fourth, the agency and court save important time and resources. A contested termination of parental rights trial takes a great deal of agency staff time to prepare and present as well as considerable time and effort by the attorneys for the parties and the court.

Fifth, relatives who are willing to adopt the child may not be willing to go through an adversarial proceeding. Their willingness to adopt may depend upon gaining a voluntary relinquishment. Parents may be more willing to relinquish when they know that a specific relative or foster parent will be adopting.

It is important that there be assurances that parents are well informed and unpressured when relinquishing parental rights. It is equally important that parents not be pressured to work toward family restoration. Where parents recognize their inability to care for their children, public agencies and courts should honor their wishes. However, no voluntary relinquishment should be accepted if it is not in the child's best interest.

2. ***Process of Voluntary Relinquishment:*** **We recommend that State law clarify the process of voluntary relinquishment and establish specific procedures to ensure that consent is voluntary and that parents fully understand their rights and alternatives.**

Commentary

To ensure that relinquishment is really voluntary and parents are fully informed when relinquishing their parental rights out of court, State law should clarify the procedures for taking a voluntary relinquishment, to ensure that the following actions take place.

- Agencies advise parents of their right to consult with counsel before relinquishing parental rights and of their right to court appointed counsel if they cannot afford to retain their own counsel.
- Agencies provide counsel to parents who are minors.
- Qualified agency staff or social workers inform parents of the meaning and consequences of adoption and consequences of withholding or giving false information concerning the other parent.
- Qualified agency staff or social workers inform parents of options to voluntary relinquishment, including available services and the right to oppose adoption in court.
- Relinquishment counseling is provided in a language in which the parents are fluent.
- Someone with no stake in the outcome takes the relinquishment; either the relinquishment is taken in court before a judge or before a neutral representative of the agency who is not the caseworker who counseled the parent.
- Parents are informed of the conditions under which they can withdraw consent after having granted it (e.g., the deadline within which they can rescind their consent).
- Complete documentation of any discussions with parents concerning voluntary relinquishment—including a summary of the content of the discussion as well as the place, persons present, and the time and length of discussion—is submitted to the court.

(For other detailed suggestions concerning procedures for voluntary relinquishment, see the National Conference of Commissioners for Uniform State Laws, Uniform Adoption Act, §§2-402 to 2-406, 1994.)

In many States, voluntary relinquishment is a common process for termination of parental rights of foster children. Depending on State law and upon the circumstances of the individual case, parents may voluntarily relinquish their rights by signing a document outside of court (e.g., in the office of a child welfare or adoption agency). Or parents may verbally relinquish their rights on the record in the presence of a judge.

Voluntary relinquishment can be encouraged, in appropriate cases, by mediation or skilled relinquishment counseling. For example, where the outcome of an impending contested case is clear and where parents do not really want to take the steps necessary to regain custody of their children, it is helpful to offer such mediation or counseling. (See Chapter V, Non-Adversarial Case Resolution, discussing the use of mediation to achieve voluntary relinquishments of parental rights.) Note that, when properly handled, mediation and skilled counseling help ensure that relinquishment decisions are well informed and fully voluntary. Careful counseling and mediation reduce the likelihood that the relinquishment will be later withdrawn or challenged.

It is important that agency staff and mediators handling relinquishment counseling be comfortable and familiar with the parents' culture. This makes it more likely that relinquishment counseling will succeed, helps avoid misunderstandings and failures of communication, and leads to solutions that family members ultimately will accept.

3. ***Grounds to Withdraw Parental Consent or Voluntary Relinquishment:*** **We recommend that State law limit the grounds under which parental consent may be withdrawn or voluntary relinquishments can otherwise be set aside.**

Commentary

While State law should ensure the fairness of relinquishments, it should also reduce the likelihood of collateral attacks by biological parents on termination or adoption decisions. There are three circumstances in which recision of voluntary relinquishment should be possible: the parent changes his or her mind (within a specified deadline); coercion; or fraud. First, where a parent voluntarily relinquishes parental rights outside the courtroom, the law should specify a short but reasonable period of time in which the parent may withdraw consent for any reason. An example would be within 30 days (or ten days if the child has already been placed with prospective adoptive parents). The Expert Work Group did not agree on the appropriate length of time within which a voluntary relinquishment could be withdrawn based on a parent's change of mind. However, the Group agreed that if voluntary consent to relinquish is taken in the presence of the judge, there should be no period of time within which the parent can withdraw consent without cause.

The law should specify a short but reasonable time within which a parent can seek to set aside a voluntary relinquishment due to coercion or failure to advise of the right to counsel. For example, the deadline might be within [10]-[30] days of the relinquishment. It might be within [10]-[30] days after the parent is released from the hospital following the birth of the child, until the court has granted termination of parental rights, or until the child is placed for adoption, whichever comes last. The Expert Work Group did not agree on the amount of time that parents should be allowed to set aside a termination or adoption based on coercion or failure to advise them of their right to counsel.

However, there should be no deadline within which a parent can seek to overturn termination of parental rights or adoption based on a fraudulent voluntary relinquishment. If a

child has been stolen and voluntary relinquishment has been forged or if consent has been obtained through misrepresentation, the law should not encourage such actions by upholding the termination of parental rights or preserving the adoption.

At the same time, the reversal of a termination or adoption decision based upon an invalid voluntary relinquishment should not necessarily require that custody be restored to the parent. If a child has formed a parent-child bond with an adoptive parent and the adoptive parent was not responsible for or aware of the fraud, the court should be empowered to award custody to the adoptive parent if this action is clearly in the best interest of the child. (For other suggestions concerning rules and procedures for withdrawal of voluntary relinquishment, see the National Conference of Commissioners for Uniform State Laws, Uniform Adoption Act, §2-409, 1994.)

GUIDELINES FOR TERMINATION OF PARENTAL RIGHTS PROCEDURES

4. ***Parties to Termination of Parental Rights Proceedings:*** **We recommend that State law provide that the parties to a termination of parental rights are the child, agency, and parent. Either the agency or the child should be able to file a petition for termination of parental rights. In addition, the court should have the authority to order the agency to file a petition.**

Commentary

State law should provide that the child, the child's attorney and a representative of the child welfare agency are authorized to file a petition to terminate parental rights. The child's attorney or a guardian ad litem who is an attorney should be able to file a petition for termination because it is the child's interests that are at stake and because agencies sometimes fail to do so within a reasonable time after a child enters foster care. If a child has a non-attorney guardian ad litem or CASA volunteer who is not an attorney, the guardian ad litem or CASA should be able to obtain the assistance of counsel to file a petition. (For a discussion of foster parents' standing, see Chapter VII, Standards for Legal Representation of Children, Parents, and the Child Welfare Agency.)

Most petitions for the termination of parental rights are likely to continue to be filed on behalf of public child welfare agencies. (For a discussion of how child welfare agencies should be represented and the most appropriate relationship between the agency and their attorneys, see Chapter VII.)

Courts should be empowered to order agencies to initiate termination proceedings when there is reason to believe that there may be grounds for the termination of parental rights. This helps assure that children unable to return home will be freed for adoption within a reasonable time after entering foster care.

An argument against judicial power to order a party to file a petition to terminate parental rights is that only a party and not the court can decide to initiate judicial proceedings. This argument fails to take into account the unique nature of child abuse and neglect proceedings.

First, a termination of parental rights proceeding should be considered part of the overall child abuse or neglect case. The case is not completed until the child is returned home and the court ends its supervision or the child is adopted or placed in permanent guardianship. Second, the court is compelled to make a permanent placement decision for the child as the case proceeds. Third, the court must be empowered to require that parties put evidence before it to enable the court to make those choices. Without that power, the judge cannot ensure that a permanent placement decision will be made within the time the law requires. When the court orders the filing of a termination of parental rights petition, it has determined that there may be sufficient facts to justify this action. The court is requiring the parties to produce evidence to permit the court to determine whether or not the option of termination is legally justified. A court order to file a termination petition does not constitute the court's judgement on the merits of the termination petition but is a preliminary procedural order required by the court's duty to see that a permanent plan is implemented for the child.

Some States give foster parents standing as parties if they have been the child's foster parents for an extended period of time or if they have formed such a close relationship with the child that they are the child's psychological parent. Foster parent standing may include the right to file a petition to adopt or to terminate parental rights. These **Guidelines** take no position on this issue. (For further discussion of foster parent standing, see Chapter IV, Court Process, Guideline 32, Commentary.)

5. ***Timing for Filing a Termination of Parental Rights Petition:*** **We recommend that State law permit the filing of a termination of parental rights petition whenever there is a ground for termination.**

Commentary

Some State laws allow termination of parental rights petitions to be filed only after the child has been in foster care for a specific period of time. For example, some State laws require a certain period of time to have passed following the adjudication and disposition stages of the case. In other States, if a petition to terminate parental rights is not filed at the beginning of the case, there is a mandatory waiting period.

Having mandatory waiting periods for termination effectively defeats the purpose of some grounds for termination of parental rights. For example, when an infant has been abandoned and there are grounds for termination based on a brief but unsuccessful diligent effort to locate and identify the parent, a waiting period undermines the legislative intent to provide a speedy adoption. Similarly, these **Guidelines** recommend certain grounds for termination based on extreme and hopeless circumstances in which reunification services are not required. Such grounds are undermined by a mandatory waiting period.

Where termination grounds do not require agency efforts to help parents improve, there is no logical reason to delay the termination petition. As long as the petition alleges proper grounds for termination, it should be possible to file at any time.

ASFA and CAPTA require, subject to exceptions, early filing of termination of parental rights petitions in certain specific situations. ASFA requires the filing of termination of parental rights petitions when parents have committed certain crimes against children and when infants have been abandoned. [ASFA §302, 42 U.S.C. §675(5)(E).] CAPTA requires "expedited termination of parental rights" for abandoned infants. [42 U.S.C. §5106a(b)(2)(a)(xi)(I).]

6. ***Time Limits for All Stages of Termination of Parental Rights Proceedings:*** **We recommend that State law specify standard time limits for all stages of termination of parental rights proceedings. State legislatures should also ensure that courts and agencies have the resources and capacity to meet such deadlines.**

Commentary

Timely termination proceedings enhance children's prospects of a successful adoption. Long delays often reduce children's chances for adoptive placement and increase their psychological vulnerability.

Court procedures for the termination of parental rights should encourage timely decisions and eliminate inappropriate delay in all stages of termination of parental rights proceedings. Statutes or court rules should establish deadlines within which courts complete termination of parental rights trials. For example, statutes or court rules might specify that a termination of parental rights trial be completed within 60 or 90 days after service of process on the parent. A judge might be empowered to make exceptions to such time limits, but only where there are special circumstances justifying the delay and only where these circumstances are documented in the court record.

There also should be detailed time lines for all stages of the termination case (most probably set forth in court rules). At or before the conclusion of each hearing, the date and time of the next hearing should be scheduled. Strict caseflow management principles should apply as in other stages of the court process. (See Chapter IV, Court Process.) Chapter 8 of *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases* (National Council of Juvenile and Family Court Judges 1995) sets forth specific time lines for the different stages of termination of parental rights proceedings, beginning with the filing of the petition. (See pages 91-94.) For example, the *Resource Guidelines* suggest that there be a pretrial hearing within 30 days after the filing of the termination petition and that, if service of process is complete by that time, the trial be set within another 30 days.

Unlike criminal cases, when timetables or deadlines for child protection are not met, cases should not be dismissed with prejudice. Instead, enforcement might occur through self-monitoring by trial courts or monitoring by higher State courts.

State legislatures and supreme courts should be aware of the causes of court delay when setting timetables for court proceedings. Delays in termination of parental hearings may be partly the result of shortages in judges, court staff, legal assistance to the agency or agency casework staff. If so, the courts may need to ask the legislature to provide further financial

resources to the courts (e.g., for added judges and staff) and agencies to make it possible to meet the new deadlines.

The State courts should inform the legislature of what it will take to correct the specific problem of delays in termination cases. The legislature should be aware that the delays in termination of parental rights increase other State expenditures; termination delays prolong costly foster care placements and increase agencies' administrative costs.

7. ***Trials Without Juries:*** **We recommend that State law provide that termination of parental rights cases are tried without a jury.**

Commentary

Among the reasons for having termination proceedings tried by judges rather than juries are the following. First, jury trials proceed more slowly than trials by judges and thus delay permanency for children. Second, jury trials take far more attorney and court time than trials by judges, thus crowding the court docket and preventing attorneys from preparing other cases. This further delays permanency for children. Third, for reasons described elsewhere, the quality of decisions in child abuse and neglect cases is better when a single judge hears all stages of the same case. (See Chapter IV, Court Process.) Few States currently provide for jury trials on the question of termination of parental rights and, even in those States, jury trials are seldom used.

If a State chooses to allow a right to a jury trial in termination of parental rights cases, however, all parties including the State, the parents, and the child should have the right to request a jury.

8. ***Steps Following Termination of Parental Rights Review and Termination Order Setting Requiring Revised Plan:*** **In order to ensure that reasonable efforts are made to achieve a timely permanent plan for the child, we recommend that State law require that at the conclusion of the hearing in which a court decides whether to terminate parental rights, the court will:**

   a. **Set a specific time for the review to take place within a specified time.**
   b. **Require the filing of a revised plan and progress report a specified number of days prior to the review hearing.**

Commentary

The *ABA Court Rules to Achieve Permanency for Foster Children* recommend, in cases where termination is granted, strict deadlines for the filing of a post-termination placement plan, a post-termination review, and the filing of a pre-review report. (Rule 87.)

If the court orders termination of parental rights, the next hearing will be a post-termination review designed to ensure speedy progress to achieve adoption of the child. The Expert Workgroup did not recommend specific time limits for the review, but did suggest varied time periods, including 60, 90, or 180 days following termination of parental rights.

GROUNDS FOR TERMINATION OF PARENTAL RIGHTS: GENERALLY

9. *Termination of Parental Rights Grounds, Generally:* We recommend that State law authorize the court to terminate parental rights if the court finds as follows:

a. By clear and convincing evidence, that one or more of the statutory grounds exists (See Guidelines 11-22); and

b. By a preponderance of the evidence that termination is in the best interests of the child (See Guidelines 23-26).

Commentary

State law should authorize termination of parental rights when: (a) a parent cannot or will not provide a safe and permanent home for the child within a reasonable time; and (b) termination of parental rights is the best plan for the child, taking into account other options. Termination should not be pursued when the parent will provide a safe home or when termination is not best for the child. The challenge in drafting State termination of parental rights statutes is to encompass all circumstances in which termination is appropriate without including those in which it is not.

Grounds for termination of parental rights should be clear. These **Guidelines** recommend a set of specific and separate grounds for termination of parental rights. That is, each ground, standing alone, may support the termination of parental rights if termination is also in the child's best interests. By creating separate and self-contained grounds for termination, States can make it clear under which types of circumstances termination of parental rights is authorized. (For a discussion of grounds for termination of parental rights, including their structure, see M. Hardin & R. Lancour, *Early Termination of Parental Rights: Developing Appropriate Statutory Grounds* 9-29, ABA 1996.)

Separate termination grounds can also make it clear whether or not, under specified circumstances, the child welfare agency must have made efforts to reunify the family. By contrast, in States with legislation that lists factors supporting termination rather than separate grounds, there are no clear circumstances justifying termination. For example, where one factor to be considered in all termination cases is whether the child welfare agency has made efforts to reunify the family, it is unclear when, if ever, termination is possible without such efforts.

Several States have recently amended their laws to make it clear when termination is possible without prior services to reunify the family. For example, Arizona recently amended its law to delete the requirement that the court consider, in all termination cases, "the availability of reunification services and whether the parent participated in those services." [Ariz. Stat. §8-533(B), as amended by Ariz. Laws 1998, ch. 276, §13.] Arizona law now provides that termination can be ordered if one or more grounds apply and termination is in the best interests of the child. (Id.) Some grounds require such services and some do not. Florida recently amended its termination grounds to specify that for five of its nine grounds for termination "reasonable efforts to preserve and reunify families shall not be required." [Fla. Sess. Laws, Ch 98-403 §88, to be codified as Fla. Stat. §39.806(2).]

Santosky v. Kramer, 455 U.S. 745 (1982), requires that grounds for the termination of parental rights be proved by clear and convincing evidence. Once grounds are established, a court may terminate parental rights if there is a preponderance of evidence that it is in the best interests of the child. The parental rights of an Indian child may not be terminated, however, unless there is evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that continued custody by the parent or Indian custodian will likely result in serious emotional or physical damage to the child. [25 U.S.C. §1912(f).]

10. ***Grounds for Termination and Criteria for Not Requiring Reunification Services:*** **We recommend that State law prohibit leaving children in legal limbo following a judicial decision relieving the agency of the responsibility to provide reunification services.**

Commentary

States need to examine their laws and procedures to make sure that following a judicial decision not to require reunification services for a child, it will legally be possible to secure another permanent home for the child. Under certain circumstances, it should be legally possible to terminate parental rights. If a child in foster care will not be returned home, termination should be possible. If reunification services will not be provided for the child's family, and if adoption is in the child's best interests (as opposed to guardianship by a relative or some other permanent caretaker), it should be legally possible to terminate parental rights. Otherwise, due to inadequacies in State law, the child will remain indefinitely in foster care.

States need to consider carefully and debate what connection, if any, there should be between the circumstances in which reunification services are not required and particular grounds for the termination of parental rights. This issue is complicated. The Expert Work Group concluded, however, that in order to avoid leaving children in foster care limbo, State law should ensure that for those circumstances in which reunification services are not required, there are applicable grounds for the termination of parental rights. While the criteria for not requiring reasonable efforts need not be the same as grounds for termination, they reasoned, the State should take care to avoid situations in which a child will remain in foster care without efforts to reunify his or her family. In this situation, it is not possible to terminate parental rights although adoption is in the child's best interests.

The Expert Work Group agreed that there should be grounds for termination that will permit cases to move forward when it is decided that reasonable efforts to reunify are not required. However, there was no consensus about whether all termination grounds must have a corresponding situation where reasonable efforts would not be required.

COMMON GROUNDS FOR THE TERMINATION OF PARENTAL RIGHTS

The Expert Work Group recommends the following types of grounds for the termination of parental rights. These **Guidelines** make suggestions concerning what should be included in such grounds.

11. *Failure to Improve:* We recommend that State law include a ground authorizing termination of parental rights based on the parent's failure to improve.

Commentary

State law should include a ground authorizing termination of parental rights when, despite the diligent efforts of the agency to make it possible for the child to return home, the parent has failed, for a specified time, to correct the circumstances causing the child to remain in foster care. The majority of the Expert Work Group recommended a minimum of one year and a minority recommended 6 months. Still others recommended that a time not be specified.

States enacting such time limits need to decide not only the length of time, but also when the time period begins. The following are three possibilities for when the time period begins: (a) the time that the agency first offers services, possibly when the child is still at home; (b) the time a child enters foster care; or (c) the time that the court approves a reunification plan (e.g., at disposition).

States should also note that Federal law requires initiation of proceedings to terminate parental rights for children who have been in foster care for 15 out of the previous 22 months, *except in specified circumstances* (such as a compelling reason that termination is not in the child's best interests). [See 42 U.S.C. §675 (5) (E) and §103 (c) of ASFA.]

In most jurisdictions, the failure to improve ground for termination of parental rights is the most commonly used. To prove this ground, the agency shows that the agency has made a good effort to help the parent, but the parent has failed to improve. That is, even with the agency's efforts to help, the parent has failed to correct those specific conditions leading to the child's removal or has created new barriers to the child's safe return. The parent either persisted in the behaviors that originally caused the child to be placed in foster care or engaged in new behaviors making it impractical or dangerous to return the child home.

The Expert Work Group disagreed about whether termination of parental rights should be allowed when important services to preserve the family were not available. The majority thought that if termination is allowed when services are not available States will be encouraged to terminate parental rights rather than to spend money, when needed, to preserve families. A minority thought that children should not have to spend years in foster care because needed services to families do not exist. They said there are better ways to encourage the development of services. They questioned whether requiring courts to refuse to terminate parental rights in such cases actually would cause States to expand services for families.

Wisconsin has enacted a ground for termination of parental rights consistent with this Guideline, except that it allows the parent 6 months to demonstrate "substantial progress." Specifically, Wisconsin law authorizes termination of parental rights based on "continuing need of protection or services," which is established by proving all of the following:

(a) That the child has been adjudged to be in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders [citing Wisconsin statutes].
(b) 1. In this paragraph, "diligent effort means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court," which takes into consideration the characteristics of the parent or child, the level of cooperation of the parent and other relevant circumstances of the case.
2. That the agency responsible for the care of the child and the family has made a diligent effort to provide the services ordered by the court.
(c) That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders; and that the parent has failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home. There is also a substantial likelihood that the parent will not meet these conditions within the 12-month period following the [adjudication].
Wisc. Stat. §48.415(intro)(b), (2), as amended by 1997 Wisc. Act 35, §98.

Virginia has also enacted a ground for termination of parental rights that is consistent with this Guideline. Under Virginia law, parental rights of a child placed into foster care can be terminated if the court finds that:

> The parent or parents, without good cause, have been unwilling or unable within a reasonable period not to exceed twelve months from the date the child was placed in foster care to remedy substantially the conditions which led to or required continuation of the child's foster care placement, notwithstanding the reasonable and appropriate efforts of social, medical, mental health or other rehabilitative agencies to such end.
> Proof that the parent or parents, without good cause, have failed or been unable to make substantial progress towards elimination of the conditions which led to or required continuation of the child's foster care placement in accordance with their obligations under and within the time limits or goals set forth in a foster care plan filed with the court or any other plan jointly designed and agreed to by the parent or parents and a public or private social, medical, mental health or other rehabilitative agency shall constitute prima facie evidence of this condition.
>
> The court shall take into consideration the prior efforts of such agencies to rehabilitate the parent or parents prior to the placement of the child in foster care.
> Va. Code Ann. §16.1-283(C)(2) (1998), as amended by 1998 Va. Laws, Ch. 550, §1.

Note that under Virginia law, the improvement period begins when the child is placed into foster care.

Ohio's "failure to improve" ground for termination is consistent with this Guideline, except that no time period is specified. Ohio law authorizes termination of parental rights if termination is in the best interest of the child and if one of several grounds establish that the child "cannot be placed with either of his parents within a reasonable time or should not be placed with his parents." [Ohio Rev. Code Ann. §2151.414(B)(1), 1998.] Ohio's failure to improve ground reads as follows:

> Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.
>
> Ohio Rev. Code Ann. §2151.414(E)(1) (1998).

Note that under this ground, like the others, the agency must have fulfilled its duty to assist the parent but, despite those efforts, the parent failed to improve.

Arizona has enacted an interesting statutory ground for termination of parental rights that also is consistent with this Guideline. Arizona law, making a distinction between parents who have willfully or neglectfully failed to improve and those who have been unable to do so, authorizes termination if:

> [T]he child is being cared for in an out-of -home placement under the supervision of the juvenile court, the division or a licensed child welfare agency, that the agency responsible for the care of the child has made a diligent effort to provide appropriate reunification services and that either of the following circumstances exists:
> (a) The child has been in an out-of-home placement for a cumulative total period of nine months or longer pursuant to court order and the parent has substantially neglected or willfully refused to remedy the circumstances which cause the child to be in an out-of-home placement.
> (b) The child has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order, the parent has been unable to remedy the circumstances which cause the child to be in an out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future.
>
> Ariz. Stat. §8-533(B)(7), as amended by Ariz. Laws 1998, ch. 276, §13.

12. ***Abandonment and Parental Identity Unknown:*** **We recommend that State law authorize termination of parental rights when the parent has abandoned the child and the identity of the parent is unknown.**

Commentary

State law should authorize termination of parental rights when the parent has abandoned the child for a specified time and the identity of the parent is unknown and cannot be ascertained despite diligent efforts to do so. Suggested time periods for abandonment varied, including 30, 60, and 90 days.

Sometimes children are abandoned with no identifying information about the identity of the parents. When parents' identities cannot be determined, statutory grounds should allow timely decisions to terminate parental rights. On the other hand, it is necessary that agencies attempt to locate parents, to avoid termination in situations where there are interested non-custodial parents and where children have been kidnapped or lost.

Federal law requires that termination petitions be filed when a court has determined a child to be an abandoned infant (as defined under State law). [ASFA, Public Law 105-89, §103(a), amending §475 of the Social Security Act, 42 U.S.C. §675(5)(E).] And, CAPTA requires that States have effective means for the "expedited termination of parental rights in the case of any infant determined to be abandoned under State law..." [CAPTA, §107, 42 U.S.C. §§5106a(b)(2)(A)(xi)(I).]

Michigan has enacted a ground for termination of parental rights that is consistent with this Guideline. Michigan authorizes termination of parental rights when:

> The parent of the child is unidentifiable, has deserted the child for 28 or more days, and has not sought custody of the child during that period. For the purposes of this section, a parent is unidentifiable if the parent's identify cannot be ascertained after reasonable efforts have been made to locate and identify the parent.
>
> Mich. Comp. Laws, §712A.19b(3)(a)(I) (1998).

Wisconsin's statutes require a longer search, but do not require that the identity of the parent be unknown, authorizing termination when:

> The child has been left without provision for its care or support; the petitioner has investigated the circumstances surrounding the matter and for 60 days has been unable to find either parent.
>
> Wisc. Stat. §§48.415(intro)(a), 48.415(1)(a)(1), as amended by 1997 Wisc. Act 35, §98.

Pennsylvania statutes authorize termination when:

> The child is in the custody of an agency; having been found under such circumstances that the identity or whereabouts of the parent is unknown and cannot be ascertained by diligent search and the parent does not claim the child within three months after the child is found.
>
> Pa. Stat. Ann. tit. 23 §2511(a)(4) (1998).

Note that it is required that the parent's identity *or whereabouts* be unknown.

13. ***Abandonment of Infant by an Unmarried Father:*** **We recommend that State law authorize termination of parental rights for abandonment of an infant by an unmarried father.**

Commentary

State law should authorize termination of parental rights of a father who is not married to the mother of an infant less than one year old when the father abandons the child under certain conditions. If the father failed to visit the child, establish paternity, or provide financial support within 30-60 days after becoming aware of the child's birth, termination should be authorized. The majority of the Expert Work Group was concerned about the strictness of the time requirements imposed on the unmarried father. If the father did not attempt to seek custody within 30 days after becoming aware that the child was placed into foster care, although the father was informed of the opportunity to seek custody, termination should be authorized.

This ground would require the child welfare agency to diligently search for both parents of a child before a termination of parental rights petition is granted. If a father is located soon after the birth of a child and was previously unaware of the child's birth, State law should allow the father to take immediate steps to seek custody of the child. The father's failure to take such steps, should be grounds for termination. The agency has a responsibility to search for both parents not only out of fairness to the parents, but also because extended family ties may be important to the child.

Texas has enacted a ground for the termination of parental rights based on abandonment of an infant by a father. Texas law authorizes termination of parental rights when a father:

> Voluntarily and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth.
>
> Tex. Fam. Code Ann. §161.001(1)(H) (1998).

Arizona authorizes termination of parental rights when a parent "fails to file a paternity action within 30 days of completion of service of notice" in an adoption proceeding. [Ariz. Rev. Stat. Ann. §8-533(B)(5), 1998.]

Pennsylvania law deals with abandonment of newborns by unmarried fathers through the following ground for termination:

> In the case of a newborn child, the parent knows or has reason to know of the child's birth, does not reside with the child, has not married the child's other parent, has failed for a period of four months immediately preceding the filing of the petition to make reasonable efforts to maintain substantial and continuing contact with the child and has failed during the same four-month period to provide substantial financial support for the child.
>
> Pa. Stat. Ann. tit. 23 §2511(a)(6) (1998).

Note that this ground might also apply to an unwed mother who abandons a child at birth. Also the waiting period of four months is longer than the (60-day) maximum recommended by this Guideline.

14. *Extreme Parental Disinterest:* We recommend that State law authorize termination of parental rights based on extreme parental disinterest in a child.

Commentary

State law should authorize termination of parental rights when a parent has demonstrated extreme disinterest in a child for 6 months if the child is three or older or three months if the child is less than three. Extreme disinterest means that the parent made only minimal contact or communication with the child. There is no proof of extreme disinterest, however, when a parent did not have the ability or opportunity to maintain greater contacts or involvement with the child. There also is no proof of extreme disinterest when the parent does not know of the child's existence.

The prolonged lack of parent-child contact should be enough to justify termination of parental rights even when it has occurred before a child protection agency has become involved in a case. A parent's intentional failure to maintain contact with a child, occurring without justification and for a prolonged period, demonstrates that the parent is not interested in or committed to the child. If this has occurred before the child protection agency has been involved, the agency should carefully evaluate the appropriateness of developing a reunification plan for that parent. (See Hardin & Lancour, op. cit., 31-37.)

Failure of parents to be actively involved in the lives of their children has a significant impact on their self-esteem and development. All children need their lives stabilized as soon as possible by the establishment of permanent, safe, nurturing care taking arrangements. Recent knowledge about the critical period of a child's development between birth and his or her early years suggests that parental disinterest and neglect will have long term negative consequences for the child's development. As a result, some jurisdictions have adopted shorter time frames for parental disinterest based on the age of the child.

Ohio has enacted a statutory ground for termination of parental rights that is generally consistent with this Guideline, except that no time periods are specified. The relevant ground is the following:

> The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child while able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child.
>
> Ohio Rev. Code Ann. §2151.414(E)(4) (1998).

Note that the parent need not have totally failed to support, visit, or communicate with the child. Rather, failure to "regularly" support, visit or communicate is sufficient. Note also that parental lack of commitment cannot be shown if the parent was unable to support, visit, or communicate with the child.

Oklahoma's statutory grounds for termination of parental rights based on parental "abandonment" are also essentially consistent with this Guideline. Two of Oklahoma's definitions of abandonment are the following:

> [T]he parent has voluntarily left the child alone or in the possession of another who is not the parent of the child and expressed a willful intent by words, actions, or omissions not to return for the child, or
> [T]he parent fails to maintain a significant relationship with the child through visitation or communication for a period of six (6) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for termination of parental rights. Incidental or token visits or communications shall not be construed or considered in establishing whether a parent has maintained a significant relationship with the child. Okla. Stat. Ann. Tit. 10 §7006-1.1(A)(2)(b), (c) (1998), as amended by 1998 Okla. Enr. H.B. 2826 §20.

Note that Oklahoma does not set a different time period based on the age of the child and adds a ground based on the clear expression of parental intent to abandon the child.

15. *Serious Crimes Against Children:* We recommend that State law authorize termination of parental rights based on a parent's serious crimes against children.

Commentary

Certain crimes toward children are serious enough, in themselves, to justify termination of parental rights. Accordingly, State law should authorize termination of parental rights when a parent commits specified serious crimes against children. This should include, but not be limited to, crimes specified in Federal law.

Federal law requires that the conviction of certain crimes be grounds for the termination of parental rights. Specifically, CAPTA requires as a condition for receiving Federal funds, that State laws include criminal convictions for certain crimes against children as grounds for termination of parental rights. Specifically, the law requires that

> ...conviction of any one of the [specified felonies] constitute grounds under State law for the termination of rights of the convicted parent as to the surviving children (although case-by-case determinations of whether or not to seek termination of parental rights shall be within the sole discretion of the State).
>
> CAPTA, §106, 42 U.S.C. §§5106a(b)(2)(A)(xiii).

Thus, the State may decide on a case-by-case basis whether to seek termination, but State law must include the offenses as grounds for termination of parental rights.

The crimes listed in CAPTA as mandatory grounds for the termination of parental rights are the same as the crimes listed in ASFA, in which reunification services are not required:

- Murder as defined by 18 U.S.C. §1111(a) of another child of the parent;
- Voluntary manslaughter as defined by 18 U.S.C. §1111(a) of another child of the parent;
- Aiding or abetting, attempting, conspiring, or soliciting to commit such murder or voluntary manslaughter; or
- Felony assault that results in the serious bodily injury to the surviving child or another child of such parent. [CAPTA, §107, 42 U.S.C. §§5106a(b)(2)(A)(xii).]

CAPTA also provides that reunification services are not required for parents convicted of these crimes.

Note that in the above list of crimes, the definitions of murder and manslaughter are taken from Federal law. States wishing to specify murder or manslaughter of a sibling as a ground for the termination of parental rights should include both the Federal and State statutory definitions of those terms if there are inconsistencies.

The list of crimes in CAPTA is very narrow and applies to a small fraction of children in foster care. While States *must* include the above list of crimes in their termination grounds in order to comply with CAPTA, States are free to include a more complete list of crimes constituting forms of severe or extreme child abuse and neglect.

This Guideline recommends including grounds that are more extensive than Federal requirements. For example, a State may choose to include certain extreme forms of child sexual abuse where there is no serious bodily injury. Each State should carefully and thoroughly review its criminal statutes to decide which should be grounds for the termination of parental rights.

Another important addition to the Federal grounds is that crime-based grounds for termination of parental rights should not be limited to crimes against siblings. There should be grounds for termination where the parent commits certain serious crimes against other children in the household and where the circumstances surrounding the commission of the crimes demonstrate that the parent might victimize the child in a similar way. Severely injuring another child in the household in the course of committing a crime might constitute grounds for the termination of the parent's rights.

16. *Extreme or Repeated Abuse or Neglect:* We recommend that State law authorize termination of parental rights based on the extreme or repeated abuse or neglect of children.

Commentary

State law should authorize termination of parental rights when the parent's abuse or neglect of the child, a sibling, or other child in the household was so extreme or repeated that any plan to return this child home would present an unacceptable risk. (See Hardin & Lancour, op. cit., 49-60.) Certain acts or patterns of behavior toward children are sufficient, in themselves, to justify termination of parental rights without prior efforts by the child welfare agency to help the

parents improve. Certain acts are so extreme that they make it too dangerous to risk returning the child home. Certain patterns of behavior demonstrate that there is no realistic likelihood of parental rehabilitation.

For example, acts of torture and extreme cruelty toward children may demonstrate behaviors that place the child at imminent and continued risk. If parents have abused children badly enough to cause serious injury, it may not make sense to risk future parent-child contacts. Factors a court might consider in determining whether there is extreme and repeated abuse or neglect include:

- The seriousness of the injury or harm to the child or risk of injury or harm associated with the abuse or neglect;
- Whether the abuse or neglect is the result of a parental character disorder or compulsion unlikely to change (e.g., as shown by extreme cruelty or sexual abuse); and
- The frequency and number of incidents of abuse or neglect.

Note that the above factors include not only the severity and frequency of the acts of maltreatment, but also characteristics of the parent committing the maltreatment. While a sexually abusive or sadistic parent may have the capacity or ability to care for the child (and therefore not come under Guideline 19), the abusive behavior may be the result of profound character flaws or compulsions that are unlikely to respond to treatment.

Grounds for termination based on extreme or severe child abuse or neglect should not be limited to crimes that currently exist in State statutes. While it can be helpful to cross reference to certain definitions of crimes when enacting such grounds for termination, the existing definitions of crimes are not sufficiently inclusive. First, existing definitions of crimes may not cover the full range of extreme child maltreatment that should be grounds for termination of parental rights.

Second, when injuries to children are sufficiently severe or where certain forms of sexual abuse have been committed and, in either case, there is danger of recurrence, criminal law requirements concerning intent or state of mind should not apply. For example, if a child is permanently physically disfigured or disabled as the result of parental abuse under circumstances that might be repeated, it should not be necessary to show intent.

Colorado has enacted a statutory ground for termination of parental rights that is generally consistent with this Guideline. Colorado law authorizes termination if:

> ...[T]he child is adjudicated dependent or neglected and the court finds that no appropriate treatment plan can be devised to address the unfitness of the parent or parents. In making such a determination, the court shall find one of the following as the basis for unfitness:
> (II) A single incident of serious bodily injury or disfigurement of the child.
> * * *
> (IV) Serious bodily injury or death of a sibling due to proven parental abuse or neglect.

(V) An identifiable pattern of habitual abuse to which another child has been subjected and, as a result of which, a court has adjudicated another child as neglected or dependent based upon allegations of sexual or physical abuse, or a court of competent jurisdiction has determined that such abuse has caused the death of another child.
(VI) An identifiable pattern of sexual abuse of the child.

Colo. Rev. Stat. §19-3-604(1)(b), as amended by 1998 Colo. Legis. Serv. Ch. 311 §6 (H.B. 98-1307).

Note that the Colorado grounds include habitual abuse or neglect of siblings, but do not include a pattern of habitual non-sexual abuse to the same child where such abuse does not cause serious bodily injury or disfigurement.

South Carolina law includes a ground that is consistent with this Guideline, except that it does not refer to types of abuse or neglect that suggest parental character disorders or compulsions unlikely to change:

> The child or another child in the household has been [maltreated as defined under South Carolina law] and because of the severity or repetition of the abuse or neglect, it is not reasonably likely that the home can be made safe within twelve months. In determining the likelihood that the home can be made safe, the parent's previous abuse or neglect of the child or another child in the home may be considered.
>
> S.C. Code Ann. §20-7-1572(1) (1998).

California law authorizes termination of parental rights without prior services to reunify the family based on severe sexual abuse, the infliction of severe physical harm to the child or a sibling, and abandonment constituting a severe danger to the child. [Cal. Welf. & Inst. Code §361.5(b)(6), (9), as amended by 1997 Cal. Laws, Ch. 793, §17.] The terms are defined in detail. Under California law, in addition to proving severe sexual abuse, severe physical harm, or abandonment constituting a severe danger, the court must also make the factual findings that reunification services will not benefit the child and, at a subsequent hearing, that termination is in the best interests of the child. (For a complete explanation of the California statutory scheme, see M. Hardin & R. Lancour, supra, at 50-58.)

17. *Prior Termination of Parent's Rights to Sibling:* We recommend that State law include a ground authorizing termination of parental rights based on prior termination of the parent's rights to a sibling.

Commentary

State law should include a ground authorizing termination of parental rights when all of the following circumstances apply. First, the parent abused or neglected a child's sibling. Second, following the abuse of the sibling, an agency made diligent and appropriate efforts to help the parent improve as were reasonable, but parental rights to the sibling were later terminated. And third, after parental rights to the sibling were terminated, the parent abused or neglected the child who is the subject of the current termination proceedings and the child was placed into foster care.

Under this ground, unlike the failure to improve ground, it is unnecessary to wait a year or to provide rehabilitative services to the parents before terminating parental rights. The basic premise of this ground is that when a parent has a history of prior abuse or neglect of other siblings, the State should not have to ignore that history or start over again to work to rehabilitate the parent. If an agency's efforts to help the parents failed in the past and the parent has repeated the abuse or neglect, there is no reason to assume that further efforts will succeed. (See Hardin & Lancour, op. cit., 44-49.)

Oklahoma has enacted a statutory ground for termination of parental rights that is consistent with this Guideline. Oklahoma law authorizes termination if:

> ... a subsequent child has been born to a parent whose parental rights to any other child have been terminated by the court; provided, that the applicant [party seeking termination] shall show that the condition which led to the making of the finding which resulted in the termination of such parent's parental rights to the child has not been corrected. As used in this paragraph, the term 'applicant' shall include, but not be limited to, a district attorney or the child attorney.
>
> Okla. Stat. Ann. Tit. 10 §7006-1.1(A)(6) (1998), as amended by 1998 Okla. Enr. H.B. 2826 §20.

Note that the Oklahoma ground does not require reunification services but does require that the conditions leading to the prior termination continue to exist.

Iowa has enacted a termination ground that is generally consistent with this Guideline. Iowa law requires that:

> (1) The child has been adjudicated a child in need of assistance pursuant to [citing Iowa law].
> (2) The court has terminated parental rights pursuant to [citing Iowa law] with respect to another child who is a member of the same family.
> (3) There is clear and convincing evidence that the parent continues to lack the ability or willingness to respond to services which would correct the situation.
> (4) There is clear and convincing evidence that an additional period of rehabilitation would not correct the situation.
>
> Iowa Code. Ann. §232.116(1)(k) (1998)

The Rhode Island ground is similar to the Iowa ground. It requires that:

> The child has been placed with the department for children, youth, and families and the court has previously terminated parental rights to another child who is a member of the same family and the parent continues to lack the ability or willingness to respond to services which would rehabilitate the parent and provided further that the court finds it is improbable that an additional period of services would result in reunification within a reasonable period of time considering the child's age and the need for a permanent home.
>
> R.I. Gen. Laws §15-7-7 (1998).

18. *Parental Incapacity:* We recommend that State law authorize termination of parental rights based on parental incapacity that makes the parent unable to care for the child who is the subject of the termination proceeding.

Commentary

State law should authorize termination of parental rights if the parent has a physical, emotional, or mental incapacity that is so severe that the parent cannot care for the child, taking into account the particular needs and condition of the child. There must also be no available course of treatment that can prepare the parent to care for the child within a reasonable time. This ground assumes that the degree of parental incapacity is severe enough that the parent cannot care for and protect the child and that no services can eliminate the parent's disability. Proof of parental incapacity is likely to be a combination of evidence concerning the parent's behavior toward the child, an expert diagnosis and prognosis concerning the parent's condition, and, where applicable, the parent's prior history of treatment.

The fact that a parent has any particular incapacity or disability is not a ground in itself for termination of parental rights. The parental condition must make the parent unable to care for the individual child who is the subject of the termination proceeding. Thus, a person may be mentally ill or developmentally disabled but have a sufficient level of functioning to provide proper care for the child. A parent might be capable of caring for one child but not another, particularly if one child has a condition requiring special care. The name of the parent's disability is not the crucial element in assessing parental capacity, but rather it is the parent's actual behavior and ability to provide the necessary care, support, and guidance for the child. (See Hardin & Lancour, op. cit., 37-40.)

If a parent's disability is, in itself, severe enough to sustain this ground, the agency should not be required to make efforts to help the parent improve. For example, certain types of serious and irreversible brain injuries might profoundly interfere with a parent's basic functions. Occasionally, where a physical condition has rendered the parent permanently immobile, a parent may be unable to care for a child.

More often, however, this ground applies when entities other than the child welfare agency, such as mental health programs, have unsuccessfully provided services to the parent in the past. If there is evidence that other agencies or service providers have already made substantial and appropriate efforts to help the parent, it may make no sense for the child welfare agency to try. That is, if others have already done everything that the child welfare agency might do and the parent remains unable to care for the child, there is no reason for the child welfare agency to repeat their efforts. On the other hand, this ground should not apply, if the parent stands a good chance of improving enough from further services to care for the child.

A difficult issue under this ground is how to take into account possible accommodations to the parent's disability. It is important to expect government agencies to meet their legal obligations to accommodate the disability, pursuant to the Americans with Disabilities Act and other legislation. On the other hand, it is important to be realistic about what services really will

be available to the parent. Neither the child welfare agency nor other entities are required to provide helpers who will effectively take over the function of parent.

In evaluating the parent's disabilities, it is important to consider not only the parent's capacity to meet the child's immediate needs, but also the parent's capacity to care for the child as the child grows up. For example, a particular developmentally disabled parent may be capable of caring for an infant but not able to supervise or meet the needs of an older child.

In some cases, although a parent lacks the capacity to care for a child, continuing parent-child contacts will benefit the child. If continued parent-child contacts are needed despite the parent's inability to care for the child, termination may not be in the child's best interests. Instead, guardianship or some other permanent placement arrangement may be preferred. This issue is not germane to the grounds for termination; it should be considered, however, in the development of the permanency plan and in the best interest phase of the termination proceeding.

Most State grounds for termination of parental rights authorize courts to take into account parents' capacity or incapacity to care for the child. However, many do not make it clear that, in some cases, sufficient evidence of parental incapacity is enough to establish grounds for termination. In some States, regardless of the degree of the parent's incapacity or the strength of the evidence, it may be necessary for the child welfare agency to provide services to reunify the family.

Ohio has enacted a statutory ground for termination of parental rights that is consistent with this Guideline. Ohio law authorizes termination if it is in the best interest of the child and if there is:

> Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing [to decide whether to terminate parental rights].
>
> Ohio Rev. Code Ann. §§2151.414(B)(1), 2151.414(E)(2) (1998).

This ground is appropriately narrow, given the difficulty of showing that timely parental improvement is not possible. Practically speaking, it is seldom possible to prove that a parent cannot improve unless there is a history of prior unsuccessful treatment or if the condition itself is of a type generally understood to be untreatable. It is clear from the Ohio statutory scheme that the above ground can stand alone as a ground for termination of parental rights, without evidence of child welfare agency services to reunify the family. (M. Hardin & R. Lancour, supra, at 38-39.)

Colorado has also enacted a statutory ground for termination of parental rights that is consistent with this Guideline (See Guideline 20.). Colorado law authorizes termination if:

> ...[T]he child is adjudicated dependent or neglected and the court finds that no appropriate treatment plan can be devised to address the unfitness of the parent or

parents. In making such a determination, the court shall find one of the following as the basis for unfitness:
(I) Emotional illness, mental illness, or mental deficiency of the parent of such duration or nature as to render the parent unlikely within a reasonable time to care for the ongoing physical, mental, and emotional needs and conditions of the child.

Colo. Rev. Stat. §19-3-604(1)(b) (1998).

Note that the Colorado statute makes it clear that no treatment plan is available that can remedy parental incapacity within a reasonable time. It also makes clear that the court is to focus on the parent's ability to meet the needs of the child.

ADDITIONAL GROUNDS THAT STATES MAY CONSIDER

As States examine their termination of parental rights laws, new grounds are emerging and being tested. This section addresses the emerging grounds. These proposed grounds are controversial and require thorough debate.

19. ***Extended Imprisonment:*** **We recommend that States consider whether or not to authorize termination of parental rights based on the extended imprisonment of parents.**

Commentary

States should consider whether or not State law should authorize termination of parental rights when a few specific conditions occur. First, a child has come under the jurisdiction of the court based on abuse or neglect. Second, the parent will be imprisoned for a specified time. And third, the parent-child relationship is seriously undermined due to the length of the imprisonment. In addition, the court should take into consideration whether the parent made provisions for care for the child during the parent's incarceration and the realistic possibility of early release. (See Hardin & Lancour, op. cit., 61-65.)

The Expert Work Group did not reach agreement concerning the length of imprisonment that should be sufficient to constitute grounds for termination of parental rights. However, it should be noted that some members of the Expert Work Group thought there should be no ground based on extended imprisonment.

Grounds for termination of parental rights should assure permanent homes to children of parents who will be incarcerated for long periods of time. In determining the length of sentence justifying termination, the ground should take into account the age of the child and the realistic possibility of early release. As under all grounds, the State also must show that termination of parental rights is in the best interests of the child. Thus, if a parent has arranged for a child to be cared for by an appropriate relative who would serve as the child's permanent legal guardian during the imprisonment, there should be no legal basis for termination. (See Chapter II, Options for Legal Permanency.) In addition, where an older child or adolescent has a close and positive relationship with the parent, and where this relationship may be maintained by visits during the

period of imprisonment, termination may not be in the best interests of the child regardless of the length of imprisonment.

On the other hand, if a parent has been imprisoned for a lengthy term and a small child must enter foster care, termination of parental rights may well be in the child's best interests. Termination based on lengthy imprisonment is a controversial ground in many States, because legislatures are concerned about double punishment of parents. While it is a terrible penalty for a parent to lose a child as well as personal freedom, the child's need for permanence should have priority in termination of parental rights decisions.

Arizona has enacted a statutory ground for termination of parental rights that is consistent with this Guideline. Arizona law authorizes termination if:

> ...[T]he parent is deprived of civil liberties due to the conviction of a felony ... if the sentence of such parent is of such length that the child will be deprived of a normal home for a period of years.
>
> Ariz. Rev. Stat. Ann. §8-533(B)(4) (1998).

In addition to proof of the above ground, it must also be shown the termination is in the best interests of the child. (*Id.*) In addition, it does not specify that the court is to take into account the nature of the parent-child relationship, whether the parent made provisions for care for the child during the parent's incarceration, and the realistic possibility of early release.

Iowa has also enacted a statutory ground for termination of parental rights that is consistent with this Guideline. Iowa law authorizes termination if both of the following have occurred:

> (1) The child has been adjudicated a child in need of assistance ... and custody has been transferred from the child's parents for placement....
> (2) ... [T]he parent has been imprisoned and it is unlikely that the parent will be released from prison for a period of five or more years.
>
> Iowa Code. Ann. §232.116(1)(h) (1998).

Unlike the Guideline, the Iowa ground does not specify that the court is to take into account the nature of the parent-child relationship, whether the parent made provisions for care for the child during the parent's incarceration, and the realistic possibility of early release.

Finally, Ohio has enacted statutory grounds for termination consistent with this Guideline. Ohio law authorizes termination if it is in the best interest of the child, and the child "cannot be placed with either of his parents within a reasonable time or should not be placed with his parents." [Ohio Rev. Code Ann. §2151.414(B)(1), 1998.] Among the grounds that can establish that a child cannot be placed with parents are the following:

> The parent is incarcerated at the time [termination of parental rights is first requested] and will not be available to care for the child for at least eighteen months [after termination is requested].

The parent is repeatedly incarcerated and the repeated incarceration prevents the parent from providing care for the child.

Id. §2151.414(E)(7), (8).

Note that the first ground is similar to that of Iowa, except that the required length of imprisonment is substantially shorter. Note also that the second ground does not mention the age of the child, the number of incarcerations, or the length of any period of incarceration.

20. *Drug or Alcohol Addiction and Failure of Prior Treatment:* We recommend that States should consider whether or not to authorize termination of parental rights based on parents' drug or alcohol addiction and the failure of prior treatment.

Commentary

States should consider whether or not State law should authorize termination of parental rights when the parent has drug or alcohol related impairments that are so severe that the parent cannot care for the child and the parent has refused or failed to respond to repeated and substantial treatment efforts. This ground is similar to those other grounds for termination that are based in part on previous unsuccessful efforts to rehabilitate the parent. Under this type of ground it should not be necessary to wait a year or provide new services in order to terminate parental rights. (See Hardin & Lancour, op. cit., 40-44.)

Under this type of ground previous services to rehabilitate the parent should not necessarily have been arranged or provided only by the child welfare agency. For example, it may be that the prior treatment or offers of treatment were arranged through a criminal justice agency or through a separate drug treatment organization. If the parent has repeatedly refused offers of treatment, quit treatment, or repeatedly relapsed following treatment, and if the parent abused or neglected the child while under the influence of drugs or alcohol following such treatment efforts, it should not be necessary to provide additional treatment before seeking termination of parental rights.

On the other hand, the fact that there have been some efforts at prior treatment does not necessarily justify termination of parental rights. Whether termination is justified should depend on what treatment was offered, how the parent responded, and whether there is any convincing reason to believe the parent's future response will be different. For example, if the parent came close to success in the past and there is reason to believe that the parent is now much more motivated to succeed, continuing treatment services may be appropriate.

An important question is what should constitute prior treatment "failures." Success in drug treatment should not be defined as total and permanent abstinence. In some cases, parents suffer occasional relapses, but nevertheless present no danger to the child. Two good indicators of failure of treatment for the purposes of a child welfare case may be: first, the child was endangered or maltreated during the relapse and had to be removed from home; and second, that the child probably would have been maltreated had the child been with the parent.

Some members of the Expert Work Group thought that language should be added to the Guideline requiring that "no services can help the parent care for the child." All agreed that if there are available services that would permit the child's safe return home, it is not appropriate to terminate parental rights because of an addiction to drugs or alcohol. However, the majority was concerned that the suggested language would be read to require unrealistic services, such as 24-hour respite care.

A minority of the Expert Work Group opposed any ground for the termination of parental rights based on addiction and prior drug treatment. In their view, sometimes the removal of a child from home gives parents the motivation to complete treatment although they failed in the past. For this reason, they believe that new treatment should be offered after children enter foster care for the first time, regardless of the results of prior treatment.

Oklahoma has enacted a statutory ground for termination of parental rights that is consistent with this Guideline. Oklahoma law authorizes termination if:

> The parent of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted treatment for this problem during a three-year period immediately prior to the filing of the petition which brought that child to the court's attention.
>
> Okla. Stat. Ann. Tit. 10 §7006-1.1(A)(14) (1998), as amended by 1998 Okla. Enr. H.B. 2826 §20.

Virginia has enacted a similar ground. It authorizes termination in cases where the "neglect or abuse suffered by a child presented a serious and substantial threat to his life, health or development ... and it is not reasonably likely that the condition which resulted in such neglect or abuse can be substantially corrected or eliminated so as to allow the child's safe return to his parent or parents within a reasonable period of time." Under Virginia law, proof of the following is prima facie evidence that the condition cannot be corrected within a reasonable time:

> The parent or parents have habitually abused or are addicted to intoxicating liquors, narcotics or other dangerous drugs to the extent that proper parental ability has been seriously impaired and the parent, without good cause, has not responded to or followed through with recommended and available treatment which could have improved the capacity for adequate parental functioning.
>
> Va. Code Ann. §16.1-283(B)(1)(b) (1998).

Iowa has enacted a termination ground that is consistent with this Guideline, except it does not explicitly require that prior treatment be previously offered to the parent. Iowa law requires that:

> (1) The child has been adjudicated a child in need of assistance [citing Iowa law] and custody has been transferred from the child's parents for placement pursuant to [citing Iowa law].
> (2) The parent has a severe, chronic substance abuse problem, and presents a danger to self or others as evidenced by prior acts.

(3) There is clear and convincing evidence that the parent's prognosis indicates that the child will not be able to be returned to the custody of the parent within a reasonable period of time considering the child's age and need for a permanent home.

Iowa Code. Ann. §232.116(1)(k) (1998).

21. ***Child's or Sibling's Removal, Return Home, and Subsequent Abuse or Neglect:*** **We recommend that States consider whether or not to authorize termination of parental rights based on a child's or a sibling's removal from home, return home, and the subsequent abuse or neglect of the child.**

Commentary

States should consider whether or not State law should include a ground authorizing termination of parental rights when the following sequence of events occurs: (a) a child or sibling was abused or neglected; (b) an agency made diligent efforts to rehabilitate the family; (c) the child or sibling was subsequently returned home by the agency; (d) the child who is the subject of this proceeding was later abused or neglected and had to be removed from home; and (e) the underlying causes of the episode of abuse or neglect following the child or sibling's return were similar to the causes of the abuse or neglect occurring before the child was recently removed from home. (See Hardin & Lancour, op. cit., 44-49.)

This ground is similar in some ways to the prior termination of parental rights ground, Guideline 17. Under both grounds, it is not necessary to first wait a year or provide new services to preserve the family before terminating parental rights. The premise of both grounds is that the State can take into account prior history of parental abuse or neglect and prior agency efforts to help the parents. Both grounds require that the agency tried to help the family following an original episode of abuse or neglect, the parents abused or neglected again after receiving such help, and both episodes of abuse or neglect were similar.

This ground applies when there is no prior termination of parental rights concerning a sibling. For example, this ground would allow termination under the following circumstances: a child's sibling was physically abused and placed in foster care, comprehensive rehabilitative services were provided to the parents, and the sibling was returned home. One year after the sibling's return home, the child was physically abused under similar circumstances and both children had to be placed into foster care.

Note that, under this ground, if the new incident of abuse or neglect is not similar to the original event, there is no basis for termination. If the causes of the child's original and subsequent placement are different, then different services might help remedy the more recent problem.

Arizona has enacted a ground for termination of parental rights that is generally consistent with this Guideline. Arizona law authorizes termination if all of the following are true:

(a) The child was cared for in an out-of-home placement pursuant to court order.

(b) The agency responsible for the care of the child made diligent efforts to provide appropriate reunification services.
(c) The child, pursuant to court order, was returned to the legal custody of the parent from whom the child had been removed.
(d) Within eighteen months after the child was returned, pursuant to court order, the child was removed from that parent's legal custody, is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency and the parent is currently unable to discharge parental responsibilities.
Ariz. Stat. §8-533(B)(10), as amended by Ariz. Laws 1998, ch. 276, §13.

Note that the Arizona ground does not include cases where the most recent removal was more than 18 months after the child was returned home. Note also that the Arizona law does not require that the causes of the original and more recent abuse or neglect be similar. Finally, Arizona law provides that, in applying this ground, the court is to "consider the availability of reunification services to the parent and the participation of the parent in these services." This ground probably requires that appropriate reunification services were available after the original removal of the child.

California law authorizes termination of parental rights without prior services to reunify the family based on the following:

[T]he minor or a sibling of the minor had been previously adjudicated a dependant pursuant to [citation to California law] as a result of physical or sexual abuse, that following that adjudication the minor had been removed from the custody of his or her parent or guardian pursuant to [citation to California law] that the minor has been returned to the custody of the parent or guardian from whom the minor had been taken originally, and that the minor is being removed pursuant to [citation to California law], due to additional physical or sexual abuse.
Cal. Welf. & Inst. Code §361.5(b)(3), (9), as amended by 1997 Cal. Laws, Ch. 793, §17.

Note that the California ground is silent on the provision of services to rehabilitate the family and on whether the different incidents of abuse must be similar. On the other hand, the California law applies to abuse but not neglect cases. Under California law, in addition to making the factual findings that reunification services will not benefit the child the court must, at a subsequent hearing, find that termination is in the best interests of the child. (For a complete explanation of the California statutory scheme, see M. Hardin & R. Lancour, supra, at 50-58.)

GUIDELINES FOR DETERMINING WHETHER TERMINATION WILL BENEFIT THE CHILD

Another significant factor to take into account is that the termination of parental rights also severs a child's ties to siblings and extended family members. If and/or when this is contrary to the child's best interests, it is important that other permanency options be explored. (See Chapter II: Options for Legal Permanency.)

22. *Termination Will Benefit Child:* **If grounds for termination are found, we recommend that State law require the petitioner to prove, by a preponderance of evidence, that termination of parental rights will affirmatively benefit the child.**

Commentary

Where grounds for the termination of parental rights exist, State law should also require proof that termination will affirmatively benefit the child. Termination should be considered beneficial if the child will benefit from adoption or, in unusual cases, where termination is needed because any future contacts between parent and child will be detrimental.

23. *Appropriateness of Legal Options Not Requiring Termination:* **In evaluating whether termination of parental rights is in the child's best interests, we recommend that State law authorize the judge to consider the appropriateness of legal options not requiring termination.**

Commentary

While adoption is preferred as the most permanent and legally secure option for children unable to return home, there are cases in which children are better off without parental rights being terminated. As part of the decision whether parental rights should be terminated, the parties should be able to argue that other arrangements would be better for the child. (See Chapter II, Options for Legal Permanency.) For example, in the cases of developmentally disabled parents who know the new parents and young parents whose relative will care for the child, it often is not necessary to terminate parental rights involuntarily.

24. *Termination Before Identifying Adoptive Home:* **We recommend that State law specify that the court should not decline to terminate parental rights because an adoptive home has not yet been identified or arranged or because the child cannot readily be placed for adoption.**

Commentary

Courts should not decline to terminate parental rights because it is not certain that a child will be adopted. For example, courts and agencies should not delay or block the termination of parental rights because an adoptive home has not yet been identified, or based on a view that the agency will not be able to find adoptive parents for broad categories of children. Rather, they should be willing to terminate parental rights if the agency has a realistic strategy to place the child for adoption. On the other hand, many children unfortunately remain unplaced after termination. If a defense attorney can show that the possibility of adoption is remote and that the agency has no plausible strategy to secure an adoptive home for the child, the court should take this into account in evaluating whether termination of parental rights will benefit the child.

After termination and until the child achieves a legally permanent placement such as adoption or permanent guardianship, the court should retain jurisdiction, periodically review the

case, and make sure that all appropriate steps are being taken to place the child. (See Chapter IV, Court Process, Guidelines 39 and 40.)

25. ***Termination When Parent Contacts Are Harmful*: We recommend that State law specify that the court may terminate parental rights when adoption is not the plan for the child only if any continued parent-child contacts will harm the child.**

Commentary

Only in rare cases is termination of parental rights appropriate when adoption is not contemplated. This might be the case, for example, when the child is terrified of the parent, parent-child visits are traumatic, and the only way to end parent-child contacts effectively and decisively is to terminate parental rights.

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CHAPTER VII: STANDARDS FOR LEGAL REPRESENTATION OF CHILDREN, PARENTS AND THE CHILD WELFARE AGENCY

INTRODUCTION

Children's interests are not well served unless *all* parties have good legal representation. Courts face difficult decisions about how best to protect children and judges need to be confident that they are reaching the best-informed decision about a child's future. "Given that attorneys and other advocates often determine what information a judge is presented with, it is vital that all parties in child abuse and neglect cases have adequate access to competent representation so that judges can make informed decisions." (NCJFCJ *Child Abuse and Neglect Cases: Representation as a Critical Component of Effective Practice*, 1998, p. 3.) These **Guidelines** are meant to clarify what is good practice in child welfare legal representation.

Lawyers become involved in a child welfare case whenever legal proceedings are contemplated or actually initiated. They can greatly influence a case, for good or ill, depending on their level of involvement, their training and experience, and the legal standards governing their conduct. Some States have established formal standards for lawyers representing children, and the American Bar Association House of Delegates adopted *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (February 1996). The ABA Standards, however, are merely advisory and have no legal authority in individual States. To our knowledge, there are no national standards at all for legal representation of the child welfare agency or of parents accused of child maltreatment.

These **Guidelines** recommend that legal counsel be available to the parties very early in the State intervention process, but no later than the point at which legal proceedings are initiated. Unfortunately, role ambiguity and lack of clear practice standards present problems for lawyers representing all parties (children, parents, and agencies) and result in reducing the overall quality of legal representation. Standards to guide legal representation of children, child welfare agencies, and parents accused of child maltreatment are key to improving professional practices and assuring timely decisions on permanent placement of children.

The deficiencies in legal representation in child welfare cases are certainly not universal; some jurisdictions generally achieve high quality attorney performance in these cases. In many courts, however, legal counsel for children, parents, and agencies does not achieve a minimal threshold of performance, much less the higher standard of legal representation that would be optimal. Yet, many practitioners, advocates, and others are concerned about the poor legal representation in child welfare cases nationally. In a survey by the National Council of Juvenile and Family Court Judges, the vast majority of court improvement specialists (84 percent) identified legal representation as a problematic aspect of case processing in child abuse and neglect cases. (*Child Abuse and Neglect Cases: Representation as a Critical Component of Effective Practice* by Dobbin, Gatowski and Johns, NCJFCJ, 1998). Of 25 Court Improvement Project self-assessments, most identified legal representation or the need for improved legal

training as an item for reform. (*Summaries of Twenty-Five State Court Improvement Assessment Reports,* Technical Assistance Bulletin, Permanency Planning for Children Project, National Council of Juvenile and Family Court Judges, p. 18, March 1998.) "Lack of experience, skills, training, and adequate compensation were cited as issues for parents' attorneys and children's representatives. Frequent rotation and high caseloads were problematic for many prosecutors and agency attorneys. Reports noted a lack of statutory or court rule imposed minimum requirements and qualifications for court-appointed attorneys." (Id at 18.)

Poor quality legal representation results from a variety of factors ranging from the pressure of high caseloads to poor customs and low expectations of representation in the jurisdiction. The old reputation of juvenile and family courts as a lesser "kiddie court" persists in some places, despite the increased sophistication and complexity of both the law and the underlying interdisciplinary perspective required to handle these cases effectively. Child welfare is a unique and highly specialized area of practice, yet many advocates have not received training in handling such cases. In many States, neither ethical requirements nor practice standards for attorneys in child abuse and neglect cases have been developed.

These **Guidelines** devote more attention to lawyers for children, as measured by pages and amount of text, yet the amount of text devoted to each role does not reflect their relative importance. All of the lawyer roles are important for the legal process to work fairly and efficiently for children and their families. However, attorneys for the agency and for parents can more easily draw upon existing law and tradition in their representation and generally have a clearly competent client who can identify the goals of the litigation. The role of the child's attorney, on the other hand, presents unique complications that these **Guidelines** attempt to address.

GUIDELINES AND COMMENTARY

GENERAL GUIDELINES

1. ***Standards of Practice:*** **We recommend that States require a set of standards of practice for lawyers in child welfare proceedings. Standards can be implemented by court rule, or by devolution to the State bar association or regulatory agency. Sanctions and penalties should be applied for non-adherence to standards.**

Commentary

State legislation could commit the State to a set of standards of practice for lawyers in child welfare proceedings either by direct legislative provisions or by delegation to the State bar association, court system, or regulatory agency. The responsible organization should be required to report back to the State to assure adherence to standards. Sanctions and penalties would be applied for non-adherence to standards. Gross or repeated violations of the standards should be per se ethical violations. State standards are currently in place in several States, for example,

California (Calif. Rules of Court, Rule 1438); Colorado (Supreme Court Directive 96-02); Michigan (Mich. Compiled Laws §712A.17c, as Amended, December 1998); Kansas (Kansas Supreme Court Administrative Order 100, April 19, 1995); West Virginia (Supreme Court Order in *In Re Jeffrey R.L.,* 435 S.E. 2d 162, 178-179, 1993.) (For a thorough compilation of laws governing representation of children in child protection proceedings, see Peters, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions,* Lexis Law Publishing, Charlottesville, Virginia, 1997, Appendix B, pp. 255-479.)

2. ***Training:*** **We recommend that States require training before a lawyer accepts assignment as attorney for child, parent or agency. States should establish training programs and ensure their accessibility to child welfare lawyers.**

Commentary

States should establish training and assure its accessibility to child welfare lawyers. A certain basic level of knowledge and skills is needed for this type of work. Optimally training should be interdisciplinary. It should include, but not be limited to, applicable statutory codes, case law and court procedure, the dynamics of child abuse and neglect, child development, treatment issues, communication, childhood language development, and the impact of separation and long-term consequences to a child of being in temporary care.

Training would also include techniques of negotiation, problem solving, mediation, multidisciplinary collaboration, and specialized litigation skills related to courts that have jurisdiction over these cases. Training should also focus on special skills required in child protection, such as how to prepare a child witness and collaboration with expert witnesses. Lawyers need to know when to seek and how to evaluate and use data in specialized cases, in particular data from psychological evaluations. Optimally, cross training of attorneys, particularly agency attorneys, would occur with social workers so both understand one another's responsibilities and perspectives. There may be some benefit for the CASA and the child's attorney to receive some joint training.

Lawyers should understand the reality of overrepresentation of children of color in the foster care system and be sensitive to the strengths and challenges that may be reflected among diverse cultures, races, and ethnic backgrounds. Training should enhance their understanding for working with different groups of clients who are known to the child welfare and court systems. This knowledge will affect the attorney's ability to successfully represent the client. A client's cultural context includes, but means more than, race and ethnicity. Other areas that must be considered in each case are economic status, literacy, language, education, immigration status, mental and physical disabilities, gender, age, and sexual orientation. A lawyer who has lived in a homogeneous environment—whether racial, ethnic, religious or economic—may find it takes time, effort, and empathy to understand how and why people who are not like the lawyer respond to family issues differently. (See Howze, *Making Differences Work: Cultural Context in Abuse and Neglect Practices for Judges and Attorneys,* ABA Center on Children and the Law, 1996, p. 7.) Attorneys of all backgrounds can and must learn how such cultural differences can affect a person's view of his or her family, the State efforts to intervene, and the legal process.

Before receiving any assignment, lawyers should document their relevant training, which can be provided by local, State, and national bars, and professional associations. Continuing recertification is also recommended for all representatives. To evaluate the effectiveness of the training, the entire system should be analyzed to determine if it is producing qualified representatives. Training programs should have both process and outcome evaluations.

Training programs and court appointments should only be available to attorneys whose background checks show they have no criminal history of violent crimes or crimes against children.

3. *Resources.* **We recommend that States assure that sufficient resources are available for lawyers to meet the State standards of practice and that the resources should:**

   a. **provide reasonable compensation for child welfare attorneys;**
   b. **require development of reasonable caseload standards for attorneys based on the number of hours required per case and then fund positions in accordance with those caseloads;**
   c. **provide legal counsel through specialty offices or agencies so there is ongoing supervision and support for representatives;**
   d. **assure a structure that guarantees supervision and professional support for attorneys, including pro bono attorneys and attorneys for the child, whether they work in an office or independently;**
   e. **assure that suitable and adequate working conditions are maintained, including access to desks, telephones, copying equipment, etc.;**
   f. **provide private space to meet with clients;**
   g. **ensure continuity of representation for all parties.**

Commentary

Primary causes of inadequate legal representation of the parties in child welfare cases are low compensation and excessive caseloads. Reasonable compensation of attorneys for this important work is essential. Rather than a flat per case fee, compensate lawyers for time spent. This will help to increase their level of involvement in the case and should help improve the image of attorneys who are engaged in this type of work. When attorneys are paid a set fee for complicated and demanding cases, they cope either by providing less service than the child-client requires or by providing representation on a pro bono or minimum wage basis. Neither of these responses is appropriate.

Rates should also reflect the level of seniority and level of experience of the attorneys. In some offices, lawyers handling child welfare cases receive lower pay than other attorneys. This is inappropriate. Compensation of attorneys handling children's cases should be on a par with other lawyers in the office handling legal matters of similar demand and complexity. The need for improved compensation is not for the purpose of benefiting the attorney, but rather to ensure that the child receives the intense and expert legal services required.

State law should set standards for caseloads and caseloads should be reevaluated periodically. No standards or training or professional devotion to duty will produce optimal results if caseloads are too high. Depending on the level of support, the complexity of the case, and whether or not a lawyer's full-time interest is in child welfare cases, the caseload cap for a staff attorney should be set at 100 children. (See ABA Abuse and Neglect Standards §§L-1, L-2.) States could enforce caseload standards through full public reporting of caseloads throughout the State, working with localities to bring their caseloads to acceptable levels, or establishing fines for the locality that exceeds caseload limits. Limits could also be enforced through court action, including holding local officials and individual practitioners in contempt.

Rapid turnover of lawyers characterizes many courts as attorneys and cases are transferred from one unit to another in a legal office. Instead, continuity of representation by all advocates throughout the judicial process is essential. In particular, advocates for the child should continue their involvement with the child until the permanent placement is completed. Interpreters should be available to a lawyer and his or her client as necessary.

Those hiring or assigning lawyers should make every effort to recruit, hire and promote attorneys with special commitment and, in some cases, special preparation for child welfare legal work. There is a growing number of lawyers interested in specializing in child law who could help build effective legal representation programs. Since children of color are seriously overrepresented in the foster care population, recruitment of minority lawyers to serve this population is especially important. In addition to a paid professional work force, some communities have established supplemental pro bono attorney programs where volunteer attorneys, trained and supervised by specialists, provide legal representation for children. (An excellent model of such a pro bono program is the Philadelphia Support Center for Child Advocates. For assistance in setting up such a pro bono attorney program contact ABA Section on Litigation Task Force on Children at 215-925-1913.)

GUIDELINES FOR REPRESENTING BIOLOGICAL PARENTS (AND LEGAL GUARDIANS)

4. ***Parents Need Counsel in All Court Proceedings:*** **We recommend that States guarantee that counsel represent biological parents (or legal guardians) at all court hearings, including at the preliminary protective proceeding. Such representation should be provided at government expense when the parent or guardian is indigent.**

Commentary

Because of the critical importance of the very first court appearance, it is essential that parents have competent legal representation at the preliminary protective proceeding. Competent representation would probably mean providing the parents an opportunity to meet with their counsel at least an hour before the preliminary hearing. If, after entering orders necessary for the

immediate protection of the child, the court needs to adjourn the preliminary proceeding for appearance of counsel, the delay should be limited to a day or two.

In representing parents, it is important for legal representatives to remain involved in the case throughout the process. They should also include parents at all stages, and provide a thorough explanation of the process (for example, give them a set of definitions and an outline of the court process so they understand what will happen in court). In addition, when there is a conflict of interest, separate counsel should be appointed for each parent because one attorney cannot represent the interests of both parents. This is true in many juvenile dependency matters, abuse or domestic violence cases, and in other situations when parents are not living together or have distinctly different perspectives.

5. *Counsel in Voluntary Placements:* **We recommend that biological parents (or legal guardians) have legal counsel in judicial proceedings even when the out of home placement originates as a voluntary placement.**

Commentary

The underlying goal of this Guideline is to assure that parents do not give up temporary custody of their children without full knowledge and understanding of the legal consequences of their action. Parents must fully understand the legal implications of a voluntary placement, even when that placement is arranged between the agency and the parent at the parent's request and without court involvement. Where interpreters are required to adequately communicate the legal implications to the parent, they should be provided. Especially in the out-of-court setting, the agency workers should fully disclose the terms of the placement and the inherent legal risks to the child and parent. A truly voluntary and informed consent is essential. On the other hand, voluntary placement should not be discouraged when appropriate. Agencies could consider employing a trained advisor, who is independent of the child welfare caseworker, to counsel and fully inform the parent of the consequences of their voluntary temporary placement. This Guideline does not recommend that parents always obtain legal counsel before accepting agency services voluntarily or before placing their children temporarily in voluntary foster care, as long as an informed consent procedure is in place.

At the point that a placement comes to court for authorization or review, however, the parent should have legal counsel because of the serious consequences to the parent and child that could flow from the judicial proceedings. A waiver of the right to counsel should be exceptional. The right to counsel may be waived only if the waiver is genuinely free from duress and fully informed.

6. *Counsel at Voluntary Relinquishment:* **We recommend that no biological parent be permitted to relinquish parental rights, even on a voluntary basis, without the benefit of counsel.**

Commentary

Parents may not fully understand the consequences of relinquishing their parental rights. Given the fundamental importance of this act, parents should always have a right to legal counsel in judicial proceedings and such counsel should be familiar with any cross-cultural issues and have access to interpreters if needed. A waiver of the right to counsel should be exceptional. The right may be waived only if the waiver is genuinely free from duress and fully informed.

Lawyers are important for parents at relinquishment; yet it is not in the interest of lawyers for other parties to advise parents they can be represented. A well-trained lawyer representing these parents might uncover, for example, that the underlying issue is not poor parenting but is, instead, inadequate housing, domestic abuse, or some other problem that warrants a different response. The underlying goal of this Guideline is to assure that parents do not give up custody of their children without full knowledge and understanding of the legal consequences of their action. Parents should receive personal counseling, including information as to other options that may be available to them, but should not be discouraged from voluntary relinquishment if that is indeed their wish. (See discussion of Relinquishment Counseling in Chapter V, Non-Adversarial Case Resolution, and Voluntary Relinquishment in Chapter VI, Termination of Parental Rights.)

7. ***Zealous and Diligent Representation:*** **We recommend that an attorney representing a parent be legally and ethically bound to exercise diligence, zealousness, and thoroughness at each stage of the child protection process.**

Commentary

The attorney for the parents is charged with representing the interests of his or her clients zealously within the bounds of the law. (ABA Model Rules of Professional Responsibility, Rule 1.2 "A lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules.") As is the case with most legal disputes, the attorney for the parents should, in the first instance, seek to resolve any dispute through negotiation or other form of dispute resolution and avoid the contested adversarial solution if at all possible. Advocacy for the parents usually takes the form of minimizing the effects of State intervention on the family. It may include diplomatic attempts to persuade the agency to withdraw the petitions, in-court advocacy for dismissal, insistence that the charges brought by the State be legally proven in court, and negotiation for dispositions that are most acceptable to the parents.

Determining the best interest of the child is the initial task of the caseworkers and the ultimate question for the court. But, it is *not* the duty of the parent's attorney to represent or pursue the best interests of the child. (But the lawyer's loyalty and obligation runs first, foremost, and completely to the parent client.) The parent's attorney may frame his or her client's goals in terms of what is best for the child and is often correct in doing so. In order for the process to achieve the goal of best interests of the child, all perspectives must be fully and forcefully presented to the court.

A danger exists in child protection cases that personal rights of parents and children will be infringed in the well-intentioned zeal to help children and parents. Even before an attorney is appointed to represent the parents, government intervention in the family may have been initiated that has not been reviewed by any court or magistrate. The goals of the child protection system do not alter the need to recognize and respect the personal integrity and autonomy of parents. Protective State intentions do not justify any relaxation of legal safeguards or procedural protections for parents or children.

In the absence of a set of standards governing lawyer representation of parents, it is safe to say, based on the ABA Model Rules of Professional Responsibility and general practice, that prior to each hearing in the proceedings the attorney must, among other things:

a. discuss the matter with the client sufficiently in advance to have time to investigate and prepare the case;
b. conduct a thorough, independent investigation;
c. conduct formal discovery, if needed;
d. interview and subpoena necessary witnesses in advance of the hearing;
e. conduct any needed research of legal issues pertinent to the case;
f. pursue other legal actions, such as personal protection orders, divorce, child custody, or guardianship that might eliminate the need for the child protection legal process;
g. cooperate with mediation and other alternative forms of dispute resolution when it is in the interests of the client to do so;
h. help parents understand deadlines and the possibility that they could lose their parental rights;
i. help parents access services, e.g., housing, mental health treatment, and drug and alcohol treatment;
j. counsel clients on the importance of close communication with their child, the child welfare agency, and the court; and
k. continue with the case until specifically relieved.

GUIDELINES FOR AGENCY REPRESENTATION

8. *Agency is the Client:* We recommend that States define the agency attorney role as the legal representative of the agency.

Commentary

The legal representatives of the agency should be in a traditional attorney-client relationship with the agency and should be involved in the preparation of pleadings, affidavits, motions, and other legal documents. Consistent with the *ABA Model Rules of Professional Conduct*, 1.2, "The lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules." When invoking the court system, the child protection worker and agency need the services of a lawyer whom they can trust and who will

advocate for their point of view. Navigating the complex intricacies of the law and court process requires competent legal counsel. Child welfare agencies have great difficulty managing the legal aspects of children's cases when they are poorly represented or not represented at all in the traditional sense in these important court proceedings.

Currently there is great variation in the role of the attorney who appears in court with or for the child welfare agency. In some States, the attorney is expected to represent the position of the agency—the position recommended in these **Guidelines**. In other States, however, particularly where county or district attorneys bring cases on behalf of the State, the attorney may exercise independent discretion on whether to bring cases and what settlements to accept. There are serious consequences in a system where the attorney feels free to take whatever position he or she personally feels is correct. The agency and the agency caseworker can be left without legal representation for their professional recommendations in court proceedings that are increasingly complex and where a great deal is at stake.

In some States, there is confusion concerning whether attorneys are expected to represent the agency. In still other States, different attorneys may represent the State at different stages of the proceedings. In some States, such as Illinois, different State or local attorneys may appear in court at the same time, such as the district attorney for the State and the attorney general representing the legal position of the agency. We do not recommend this position. Similarly, some States have used systems of dual representation in which the same lawyer represented both the child and the agency. Courts have ruled, and we also recommend, against dual representation.

Agency lawyers' training must be broad and interdisciplinary. Lawyers who represent banks learn the banking business very well. Lawyers who specialize in labor issues become well acquainted with labor unions and labor organizing and the history of the labor movement in America. Similarly, lawyers who represent the child welfare agency must get to know both the social work profession and the child welfare system. The child welfare lawyer must understand and appreciate the emphasis on nonjudicial, yet fair, handling of child protection cases. In addition to traditional legal skills, acquiring a solid background in juvenile court proceedings and family law and philosophy is essential for the child welfare attorney. The attorney must be familiar with child development, child psychology, how children learn, family dynamics, and the psychological, sociological and political factors that bring families and children into the child welfare legal system. Training should acquaint lawyers with the reality of overrepresentation of children of color in the foster care system and should sensitize them to the strengths that may be presented by diversity of culture, race and ethnicity. The attorney should comprehend and respect the functions, the experience, and the limitations of caseworkers and other behavioral scientists. The foster care system—its limitations and strengths, its advantages and disadvantages, the benefits and risks to children—must also be carefully studied. Concepts of family preservation, family reunification, and permanency planning should become very familiar to the agency lawyer.

The agency interests may not be monolithic and may require some internal conflict resolution among the worker, supervisor, and others within the agency. The attorney for an

agency may have to respond to the caseworker(s), the agency as a whole, and the local government. The attorney may even have to reconcile competing views between the public agency and the private agency under contract to provide services to a particular child and family. Each of these may have slightly different interests. For example, while a caseworker might pose a creative solution to a problem, the agency director or commissioner may perceive this solution to be politically or financially impractical. The lawyer and the agency personnel may not share all points of view and judgments about goals and strategy, but such differences are certainly not unusual between lawyer and client and are rather common in both personal and corporate practice. Lawyers representing groups or corporations resolve similar conflicts every day relying on existing ethical rules. The lawyer's obligation is to represent the interests of the agency once that position is authoritatively determined.

Although the attorney is representing the agency, the lawyer should not be at every meeting between the caseworker and supervisor or deeply involved in every professional social work judgement. The attorney would be more efficient and effective doing legal work while freeing the caseworker to concentrate on the social work aspects of the case. In the long run, competent representation of the agency could lead to a more efficient and effective use of resources.

The agency attorney's role demands well-developed traditional legal skills. In addition, however, the attorney must know the "business" of his or her clients very well. Ultimately, a successful intervention in a family requires close collegial cooperation among the lawyer, the child protection agency, and the psychiatric, psychological, and medical consultants to the agency. (See Herring, Legal Representation for the State Child Welfare Agency in Civil Child Protection Proceedings: A Comparative Study, 24 Toledo Law Review 604, Spring 1993.)

9. ***Early Involvement:*** **We recommend that States ensure that the attorney for the agency becomes involved at a sufficiently early point to advise and assist the agency throughout the process.**

Commentary

Guidelines should define the lawyer's role partly as a counselor who helps to prevent problems. Agency counsel should be involved from the very beginning of each case so the attorney can advise and assist the agency throughout the legal process. The lawyer should participate in multidisciplinary team staffing and in other case related meetings, particularly if other parties will be represented. Agency counsel should help monitor compliance with the law and build a record for permanency options, including TPR. Agencies need counsel to help them determine the best course of action. Early involvement of lawyers can facilitate the process and assure that the agency is building a complete record for the desired legal result in the case, whether it is return home, a relative placement, or termination of parental rights and adoption. Agency attorneys must appreciate the importance of cooperative and nonadversarial resolution of cases whenever appropriate and possible and pursue negotiated or mediated settlements whenever possible. The lawyer should be involved before the decision is made to seek termination of parental rights.

Lawyers for agencies should do what lawyers traditionally do for government or corporate clients—ensure cases are reviewed as often as the law requires, that services are offered as required under law, and that the written record reflects the agency efforts and plans. The attorney should be available for non-crisis consultation and advice, including providing legal training for the caseworkers. Attorneys representing agencies should feel that, in each case, they are responsible for helping the agency reach its goal of achieving a timely resolution and permanent home for the child. Agency attorneys should be evaluated, in part, by their ability to obtain timely decisions from the courts.

Agency attorneys, as part of their responsibility to achieve timely case resolution, should (a) combat all avoidable delays in the court process and (b) help the agency understand how its actions might cause legal system delays. In addition, agency attorneys need to carefully monitor the progress of each case to identify possible problems and barriers which could cause legal delays. This includes periodically reviewing their files and talking to caseworkers even when no court hearings are scheduled. All of this, of course, requires reasonable caseloads which allow attorneys to do far more than merely to appear in court.

10. ***In-court Representation:*** **We recommend that agency caseworkers have legal representation whenever they appear in court.**

Commentary

A major reason for having guidelines for legal representation is to ensure that the caseworker observations and recommendations are fully presented and supported in court. A lawyer can also protect caseworkers from legal errors or from unfair criticism. In keeping with the obligation to support and assist the caseworker, the lawyer can advise the worker about legal standards, expectations of the court and pitfalls. The purpose of this advice is not to dictate the case direction for the caseworker, but rather to talk through the options and recommend a course of action. Under this Guideline the lawyer continues to serve as the attorney for the *agency*, not as attorney for the individual caseworker.

GUIDELINES FOR REPRESENTING CHILDREN

11. ***Zealous Attorney Representation for Children:*** **We recommend that States guarantee that all children who are subjects of child protection court proceedings be represented by an independent attorney at all stages and at all hearings in the child protection court process. The attorney owes the same duties of competent representation and zealous advocacy to the child as are due an adult client.**

Commentary

These **Guidelines** endorse the *ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* when it provides that "All children subject to court

proceedings involving allegations of child abuse and neglect should have legal representation as long as the court's jurisdiction continues." (See ABA Standards, Preface.) The court should appoint a lawyer (and other representatives, if indicated) in time to competently represent the child at the first court hearing (including an emergency hearing).

The **Guidelines** address the duties of the advocate separately from the question of who determines the goals and objectives of the child advocate. No matter whether the advocate represents the child's best interests as determined by the advocate or assumes a client directed/champion role as recommended by the ABA Standards, these **Guidelines** expect a vigorous and active participation of the child's lawyer. (See **Guidelines** 15A and 15B below for a discussion of how the goals of the advocate are to be determined.)

As a condition for receiving Federal funds, Federal law requires State law to provide that a guardian ad litem will be appointed to represent the child in every case involving an abused or neglected child that results in a judicial proceeding. [Child Abuse Prevention and Treatment Act, (CAPTA), 42 USC 5106a(b)(A)(ix).] CAPTA permits the guardian ad litem representative of the child to be an attorney or a court appointed special advocate, or both. It also requires the guardian ad litem to obtain, first-hand, a clear understanding of the situation and needs of the child and make recommendations to the court concerning the interests of the child. These **Guidelines** go further than the Federal law requirement and recommend that *attorneys* be appointed to represent a child in every child protection case. Volunteer child advocates, i.e., Court Appointed Special Advocates (CASAs), are very positive and helpful advocates for the child's best interests, and these **Guidelines** recommend the expansion of CASA programs into every jurisdiction.

A survey by the National Council of Juvenile and Family Court Judges determined that 40 States appoint counsel for children in child abuse and neglect cases. In 30 States an "attorney-guardian-ad-litem" is typically appointed who serves a dual function of representing both the best interests and the wishes of the child. In the ten other States that appoint counsel for a child, a guardian ad litem is appointed in addition to the attorney so that the attorneys perform the single role of representing the child (i.e., the child's wishes). In ten States the NCJFCJ reported that an attorney is usually *not* appointed for the child but in nine of those States a non-attorney guardian ad litem is appointed for the child. (NCJFCJ *Child Abuse and Neglect Cases: Representation as a Critical Component of Effective Practice,* by Dobbin, Gatowski and Johns, 1998.)

12. *State Standards:* We recommend that States adopt enforceable standards defining the duties of the child's attorney.

Commentary

State standards should clearly define the duties of the child's attorney. Objective standards make it easier for judges and other review bodies to assess the lawyers' performance on behalf of a client. If the lawyer misses deadlines, or does not have sufficient contact with

clients, judges or another supervising authority can remove these individuals from the list of approved representatives.

The role of the child's attorney is unique in American jurisprudence and not well defined in law or tradition. A lawyer representing a child has a client who may or may not be competent and who may be competent for some decisions but not for others. There is little guidance for the lawyer as to how he or she should fulfill the role compared to the better-developed law and ethical obligations governing lawyers as representatives of competent adults or corporations. Consequently, these **Guidelines** provide more detail as to the child's attorney than for parent and agency attorneys. The other two parties are equally important, but the duties of their counsel can rest more easily on existing law, professional standards, and tradition.

State standards should define the basic obligations and required actions of the child's attorney in accordance with the ABA Standards of Practice for Lawyers Who Represent Children. Standards addressing how the lawyer identifies the goals of advocacy, i.e., whether the lawyer represents the child's best interests or expressed wishes, are discussed in Guideline 15, Options A and B.

No matter how the goals of advocacy are identified, however, the attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child, and provide guidance. The child's attorney should communicate the child's wishes and preferences to the court. Even if a child is not competent to direct the attorney and even if the role of the attorney is defined as other than purely client directed (see **Guidelines** 15A and 15B), the wishes and preferences are always relevant and should be communicated to the court unless limited by privilege. The lawyer also has a duty to explain to the child in a developmentally appropriate way information that will help the child have maximum input in determination of the particular position at issue. According to the child's ability to understand, the lawyer should inform the child of the relevant facts and applicable laws and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings.

Recommended from the ABA Standards.

The portions of the ABA Standards governing basic obligations and required action are:

B-1. Basic Obligations. The child's attorney should:

(1) Obtain copies of all pleadings and relevant notices;

(2) Participate in depositions, negotiations, discovery, pretrial conferences, and hearings;

(3) Inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child and the child's family;

(4) Attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child;

(5) Counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the lawyer's role, and what to expect in the legal process;

(6) Develop a theory and strategy of the case to implement at hearings, including factual and legal issues; and

(7) Identify appropriate family and professional resources for the child.

C. Actions to be taken.

C-1. Meet With Child. Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the child's attorney should visit with the child prior to court hearings and when apprised of emergencies or significant events impacting on the child.

C-2. Investigate. To support the client's position, the child's attorney should conduct thorough, continuing, and independent investigations and discovery that may include, but should not be limited to:

(1) Reviewing the child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case;

(2) Reviewing the court files of the child and siblings, case-related records of the social service agency and other service providers;

(3) Contacting lawyers for other parties and nonlawyer guardians ad litem or court-appointed special advocates (CASA) for background information;

(4) Contacting and meeting with the parents/legal guardians/caretakers of the child, with permission of their lawyer;

(5) Obtaining necessary authorizations for the release of information;

(6) Interviewing individuals involved with the child, including school personnel, child welfare case workers, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses.

(7) Reviewing relevant photographs, video or audio tapes and other evidence; and

(8) Attending treatment, placement administrative hearings, and other proceedings involving legal issues, and school case conferences or staffing concerning the child as needed.

C-3. File Pleadings. The child's attorney should file petitions, motions, responses or objections as necessary to represent the child. Relief requested may include, but is not limited to:

(1) A mental or physical examination of a party or the child;

(2) A parenting, custody or visitation evaluation;

(3) An increase, decrease, or termination of contact or visitation;

(4) Restraining or enjoining a change of placement;

(5) Contempt for non-compliance with a court order;

(6) Termination of the parent-child relationship;

(7) Child support;

(8) A protective order concerning the child's privileged communications or tangible or intangible property;

(9) Requesting services for child or family; and

(10) Dismissal of petitions or motions.

C-4. Request Services. [Consistent with the child's wishes**], the child's attorney should seek appropriate services (by court order if necessary) to access entitlements, to protect the child's interests and to implement a service plan. These services may include, but not be limited to:

(1) Family preservation-related prevention or reunification services;

(2) Sibling and family visitation;

(3) Child support;

(4) Domestic violence prevention, intervention, and treatment;

(5) Medical and mental health care;

(6) Drug and alcohol treatment;

(7) Parenting education;

(8) Semi-independent and independent living services;

(9) Long-term foster care;

(10) Termination of parental rights action;

(11) Adoption services;

(12) Education;

(13) Recreation or social services; and

(14) Housing.

C-5. Child With Special Needs. Consistent with the child's wishes, the child's attorney should assure that a child with special needs receives appropriate services to address the physical, mental, or developmental disabilities. These services may include, but should not be limited to:

(1) Special education and related services;
(2) Supplemental securing income (SSI) to help support needed services;
(3) Therapeutic foster or group home care; and
(4) Residential in-patient and out-patient psychiatric treatment.

C-6. Negotiate Settlements. The child's attorney should participate in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child. The child's attorney should use suitable mediation resources.

D-1. Court Appearances
The child's attorney should attend all hearings and participate in all telephone or other conferences with the court unless a particular hearing involves issues completely unrelated to the child.

D-2. Client Explanation
The child's attorney should explain to the client, in a developmentally appropriate manner, what is expected to happen before, during and after each hearing.

D-3. Motions and Objections
The child's attorney should make appropriate motions, including motions *in limine* and evidentiary objections, to advance the child's position at trial or during other hearings. If necessary, the child's attorney should file briefs in support of evidentiary issues. Further, during all hearings, the child's attorney should preserve legal issues for appeal, as appropriate.

D-4. Presentation of Evidence
The child's attorney should present and cross examine witnesses, offer exhibits, and provide independent evidence as necessary.

D-5. Child at Hearing
In most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify.

D-6. Whether Child Should Testify
The child's attorney should decide whether to call the child as a witness. The decision should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and withstand possible cross-examination. Ultimately, the child's attorney is bound by the child's direction concerning testifying.

D-7. Child Witness
The child's attorney should prepare the child to testify. This should include familiarizing the child with the courtroom, court procedures, and what to expect during direct and cross-examination and ensuring that testifying will cause minimum harm to the child.

D-8. Questioning the Child
The child's attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.

D-9. Challenges to Child's Testimony/Statements
The child's competency to testify, or the reliability of the child's testimony or out-of-court statements, may be called into question. The child's attorney should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child.

D-10. Jury Selection
In those States in which a jury trial is possible, the child's attorney should participate in jury selection and drafting jury instructions.

D-11. Conclusion of Hearing
If appropriate, the child's attorney should make a closing argument, and provide proposed findings of fact and conclusions of law. The child's attorney should ensure that a written order is entered.

D-12. Expanded Scope of Representation

The child's attorney may request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. For example:
(1)Child support;
(2)Delinquency or status offender matters;
(3)SSI and other public benefits;
(4)Custody;
(5)Guardianship;
(6)Paternity;
(7)Personal injury;
(8)School/education issues, especially for a child with disabilities;
(9)Mental health proceedings;
(10)Termination of parental rights; and
(11)Adoption.

D-13. Obligations After Disposition
The child's attorney should seek to ensure continued representation of the child at all further hearings, including at administrative or judicial actions that result in changes to the child's placement or services, so long as the court maintains its jurisdiction.

Post Hearing

E-1. Review of Court's Order
The child's attorney should review all written orders to ensure that they conform with the court's verbal orders and statutorily required findings and notices.

E-2. Communicate Order to Child
The child's attorney should discuss the order and its consequences with the child.

E-3. Implementation
The child's attorney should monitor the implementation of the court's orders and communicate to the responsible agency and, if necessary, the court, any non-compliance.

Appeal

F-1. Decision to Appeal
The child's attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If after such consultation, the child wishes to appeal the order, and the appeal has merit, the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.

F-2. Withdrawal
If the child's attorney determines that an appeal would be frivolous or that he or she lacks the necessary experience or expertise to handle the appeal, the lawyer should notify the court and seek to be discharged or replaced.

F-3. Participation in Appeal
The child's attorney should participate in an appeal filed by another party unless discharged.

F-4. Conclusion of Appeal
When the decision is received, the child's attorney should explain the outcome of the case to the child.

End of Representation

F-5. Cessation of Representation
The child's attorney should discuss the end of the legal representation and determine what contacts, if any, the child's attorney and the child will continue to have.

From: American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases.

The appointment of the lawyer should continue until permanency is secured. If a lawyer represents more than one sibling, State standards should require the lawyer to withdraw if there is a conflict of interest. Training should help lawyers identify potential conflicts of interest (e.g.,

when the agency is unlikely to find an adoptive home for one child, but not for another). They will then be prepared to inform the court when such conflicts arise. If only one sibling is before the court, the attorney should consider some type of involvement on behalf of the other children. It may be appropriate for the lawyer to seek appointment for the other child or children.

The attorney should give the child latitude *not* to make a decision about the matters before the court, especially in cases where the child's decision-making ability is not clear. Many children do not wish to decide certain issues, so the child should be helped to understand the child can communicate his or her wishes but the court will make the decision.

13. ***Child as Petitioner:*** **We recommend that the child, with the assistance of her or his attorney have the right to petition for termination of parental rights, adoption, or any other permanent placement.**

Commentary

Many States already permit the child, through his or her attorney, to file for termination of parental rights or for another permanent placement such as guardianship. State law could create this right as another means to encourage permanent placements for children. These **Guidelines** call for the child to be involved in his or her own permanent planning and for aggressive advocacy on behalf of the best interests of the child. Federal legislation requires a permanency hearing for a child after a year in foster care. Even when it is in the best interests of the child to do so, there are occasions when the child welfare agency may not file for termination or other permanent plan on a timely basis. Often it is due to the press of other cases and duties. This legislative provision would provide important alternatives for cases that should be brought where the agency is not proceeding in a timely fashion.

GUIDELINES FOR THE ROLE OF THE CHILD'S WISHES IN DETERMINING THE ADVOCATE'S GOALS

14. ***State Law Guidance Required:*** **We recommend that States articulate clear standards regarding the role of the child's lawyer and communicate those standards to the lawyers, the courts and the clients.**

Commentary

There is considerable ongoing discussion among lawyers, judges, and other children's advocates about the appropriate role for a lawyer to assume when representing child clients. In particular, a range of views exists about the extent to which lawyers should take direction from their child clients. For the most part, States have provided inadequate guidance to lawyers for children about their proper role and, as a result, each lawyer makes her or his own decision. This ad hoc approach produces confusion among clients, other involved individuals, and the courts. It

also has the effect, overall, of reducing the quality of legal representation. In order for children to be well served by the court process, it is essential that each State clearly articulate the role the child's lawyer is expected to play.

While development of specific standards necessarily falls to each State, the Expert Work Group offers the following overview of the subject. At one end of the spectrum of the discussion are those who argue that lawyers should take direction from their clients as soon as they are old enough to articulate any position. At the other end of the spectrum are those who argue that the lawyer should advocate whatever he or she thinks is in the clients' best interest, regardless of the clients' views, until the client turns 18. Most viewpoints fall somewhere between these two extremes.

The NCJFCJ 1997 survey found that, of the 40 States that appoint a lawyer for the child, 30 expect the advocate to serve a dual role of *both* attorney representing the child's wishes and as best interests advocate. (NCJFCJ, *Representation*, page 42.) The dual role requirements are perceived as contradictory and create great confusion for the lawyers. (NCJFCJ p. 57.) Both the ABA Standards and the Fordham Recommendations take strong positions against this dual role with no authoritative guidance from the legislature or courts. These **Guidelines** also reject the dual role approach and recommend that State lawmakers provide standards to guide attorneys in this role.

The vast majority of legal scholars who have addressed this issue recommend that a lawyer should take direction from her or his child client (only) if the child is determined to have developed the cognitive capacity to engage in reasoned decision-making. (See, for example, Fordham Law Review Volume 64, March 1996.) These scholars disagree, however, about how that capacity should be assessed. Some propose a bright-line age rule and some propose a case-by-case assessment by the lawyer or by the appointing judge). Supporters of this approach focus on the following arguments. The adversary system produces its best results when all positions are argued forcefully before the court. Lawyers are ill-trained to make best interest decisions and well-trained to serve as zealous advocates for their clients' positions. Children's judgments are not consistently worse than those of adults, particularly when all options presented are fraught with risks, and, children benefit from being given an opportunity to be heard and taken seriously in the courts.

Those who favor adopting a best interest approach for all but the oldest children seek to avoid imposing the adult-like responsibility of decision-making on children, and to ensure that the court has the benefit of all relevant information before making its decisions. The burden of having to take a position and instruct the attorney to influence judicial decision-making may be inappropriately placed on the child victim. This approach places the child, who simply by virtue of being in a court proceeding is vulnerable, in a position which potentially elevates distress due to feelings of guilt, fear, divided loyalty, etc. There is real danger of re-victimization of which we must be aware and cautious. The impact on self-esteem, particularly in younger children, can be damaging. From a developmental perspective, children's cognitive perception of the world is quite egocentric until age eight or so. The child sees self as the center and cause of all that happens, which—when traumatic events such as severe sexual and physical abuse are occurring,

being removed from one's home, etc.—is terrifying. Telling the child to take on even more responsibility and "direct" his or her adult attorney may be overwhelming and traumatic for the child and exacerbate feelings of blame.

Many would argue that children are under tremendous pressure to misidentify and/or misarticulate their own interests because of pressure from their families, the court process, and the circumstances leading to the court process. (See Fordham Law Review Vol 64, March 1996.) Haralambie notes that, "Children's wishes may be based on threats, bribes, and other questionable bases..." Buss interprets Perry as "suggesting that children's communications with their lawyers are hampered by, among other things, their difficulty in dealing with the emotional and social pressure connected with the proceeding, their feelings of guilt, their difficulty understanding and framing responses to lawyer's questions, and their lack of understanding of court proceedings." Melton notes that, "The necessity of making choices can be anxiety provoking for children." (See pp. 1702-3.)

Many would argue that the lawyer does not have to be the expert in all disciplines in order to determine the best interests of the child. Rather we should strongly encourage multidisciplinary training and collaboration, and advocate for legal utilization of the expertise of other professionals in providing assessments, determining competence, and making recommendations to the court. The bottom line is that the child should be heard and considered, but should also feel safe and protected by a caring, adult attorney who will represent what is best for the child. In this situation, the child will not feel burdened by additional responsibilities that are beyond his or her emotional capacity.

To some extent, these differences in approach, as stark as they may appear when presented side by side, are more apparent than real. Under either standard, the child's wishes are to be elicited and taken seriously, and under either standard the lawyer is expected to play a counseling role—advising the client of the risks and benefits of various options and, particularly, the likely consequences of the client's expressed choices. This discussion and counseling will, in many cases, produce agreement between client and lawyer about what they perceive to be in the client's best interests.

In some fraction of cases, however, the lawyer and the child client will not agree on what the child's interests are. In those cases, the role the lawyer assumes will have a significant effect on how the lawyer represents her or his client. Both because such cases will arise, and because lawyers need to be able to explain their role, from the outset of representation in a manner that can be understood and relied upon by their clients, the development and articulation of standards of representation is critical.

The Guideline above tries to avoid a false dichotomy between wishes and best interests and focuses instead on duties of the child's lawyer, regardless of who (or how) the ultimate advocacy goals of the lawyer are determined. The wishes vs. best interests debate has received much attention in academic and policy circles that hopefully will be helpful to judges and practitioners. The Expert Work Group has not reached a consensus on this issue and instead

offers these two options to State legislatures: 15A - client-directed, and 15B - a best interests model.

15A. ***OPTION A—Client Directed*: We recommend that the child's attorney representation be client directed, that is, the child's attorney shall in all circumstances fulfill the same duties of zealous advocacy, loyalty, confidentiality, and competent representation as are due an adult client. The child's attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation. The client directed approach should be the attorney's default position and any deviation from that approach should be narrowly construed and carefully justified as follows:**

a. **If a child lacks capacity to articulate a preference, the attorney should determine and advocate the child's legal interests.**
b. **If a child does not express a preference to the attorney, the child advocate should make a good faith effort to determine the child's preference from other sources and advocate those preferences.**
c. **If the child wishes not to take a position, the lawyer shall respect the child's wishes and, in his or her best judgment, either take no position or advocate for the child's legal interests.**
d. **If the child's attorney not only believes that the child's expressed preferences are contrary to his/her opinion of the child's best interests, but also could place the child at considerable risk of severe injury or harm, the lawyer may request appointment of a separate guardian ad litem. In this case, the attorney would continue to represent the child's expressed preference, unless the child's position is prohibited by law or without any factual foundation. The child's attorney shall not reveal the basis of the request for appointment of a guardian ad litem that would compromise the child's position.**

Commentary

This option is consistent with the position of the ABA Standards and the Recommendation of the December 1995 Fordham Conference on Ethical Issues in the Legal Representation of Children. Starting with the premise of child-guided representation and consistent with Rule 1.14 of the Model Rule of Professional Conduct applicable to attorney's relations with all clients, the option requires that lawyers assume the traditional client-lawyer relationship, to the extent this relationship is reasonably possible.

If an individual child is able to understand the particular issues at stake, and to form and communicate a viewpoint to the attorney, the child should be treated as a client under the code of professional responsibility, i.e., should give binding direction to the attorney. As the matter proceeds, a child, who previously lacked maturity, might gain the maturity to direct the attorney. In addition, a child might be a "client" as to certain questions but not others.

Age alone should not be considered a disability to provide instruction to an attorney on a particular issue. For example, the child who has experienced familial sexual abuse may not be able to express an opinion on whether or not to return home, but may be able to identify which of two other placement alternatives is best.

Where the child cannot or does not express a preference, the attorney is to advocate the *legal interests* of the child, that is interests of the child as set out in legislation, case law, standards of attorney conduct, and applicable policy. The legal interests are in contrast to an imposition of the lawyer's personal views of the child's interests unguided by any outside authority.

CAPTA requires appointment of a guardian ad litem representing the child's best interests who need not be an attorney. States could adopt the recommendations of 15A *and* comply with CAPTA in two ways. First, States are free to appoint a guardian ad litem, perhaps a volunteer CASA, in addition to an attorney for the child as described in Guideline 15A. This is the preferred approach. Second, the States may appoint the attorney for the child as described in 15A in fulfillment of the CAPTA requirement. This provision is consistent with the CAPTA requirement because advocating the child's wishes and preference could be seen as in the child's best interests, serving the child's best interests, and helping the court to better arrive at overall decisions that are best for the child. The two approaches are not mutually exclusive as a court could appoint a single attorney for some children, but appoint two representatives for others, for example where the child is younger or where there are not sufficient CASAs to serve every case.

15B. ***OPTION B–Substituted Judgment:*** **We recommend that the child's lawyer shall represent the best interests of the child as identified by the child's lawyer. When a mature child's view of his or her interests conflicts with those of the child's lawyer, however, the lawyer shall communicate the child's position to the court and ask the court to appoint legal counsel who shall appear in addition to the child's lawyer.**

Commentary

Under this option, the lawyer serves as the guardian ad litem of the child representing the best interests of the child. The option is clearly consistent with the requirements of CAPTA for a guardian ad litem representing the best interests of the child. If, after discussion between the child and the lawyer-guardian ad litem, the child's wishes remain inconsistent with the guardian ad litem's determination of best interests, the guardian ad litem shall communicate the child's position to the court and ask the court to appoint legal counsel to represent the child. "Legal counsel," under this model, means an attorney who serves as the legal advocate for the child. The child's legal counsel serves in a traditional attorney-client relationship with the child and owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as the attorney would to an adult client. (See Hartmann, *Crafting an Advocate for a Child*, 31 Mich J. L. Ref. 237, Fall 1997.)

The court would appoint a legal counsel for the child if it deems it appropriate considering the age and maturity of the child and the nature of the differences between the child

and the child's attorney. In most cases the legal counsel would serve in addition to the guardian ad litem attorney but the Expert Work Group agreed the court would rarely have to appoint more than one representative for the child. In any event, the child's preferences are always communicated to the court. As guardian ad litem, the attorney-client privilege would remain intact. Volunteer child advocates, i.e., CASAs, are very helpful advocates for the child's best interests and should often be appointed in addition to the child's lawyer with the two acting as a team.

Legislation adopting this approach passed both houses of the Michigan Legislature by unanimous vote in December 1998 and has subsequently been signed into law. (See MCL 712A.13a, MCL 712A.17c as amended.)

GUIDELINES FOR COURT APPOINTED SPECIAL ADVOCATES

16. *Establish CASA Programs:* **We recommend that States establish and support Court Appointed Special Advocate (CASA) or volunteer Guardian Ad Litem programs in every court jurisdiction in pursuit of the goal of a CASA volunteer for all children who are the subjects of child protection court proceedings.**

Commentary

CASAs are screened, trained, and professionally supervised lay volunteers who advocate for the best interests of abused and neglected children, primarily in dependency proceedings. The volunteer's role is distinct from, yet complementary to, that of lawyers who represent children. Although they do not provide legal services, CASA volunteers conduct detailed fact-finding investigations, get to know the child, monitor the child's progress through the court system, help to broker services in the community, and submit reports to the court which include recommendations concerning services and placement for the child.

Consistent with the requirements of CAPTA (see commentary to section 11 above), CASAs may act as guardian ad litems. However, the standards governing operation of these programs do not permit the volunteers to provide legal advice, and legal assistance should be available to all such volunteers.

All CASA programs and volunteer guardian ad litem programs operating as part of the CASA network must comply with standards issued by the National Court Appointed Special Advocate Association. In addition, 26 States have established additional State standards. Among the requirements are low caseloads (not more than one or two cases per volunteer); careful selection and screening; and comprehensive and ongoing training. In order to assure quality volunteer representation, adequate resources must be available to such programs to meet these standards.

State and judicial support is also essential to the success of a CASA or volunteer guardian ad litem. The National Council of Juvenile and Family Court Judges has long endorsed CASA programs and supported their expansion.

To implement this recommendation for volunteer CASAs for children, States may adopt any of several CASA program models. One of the strongest is the use of attorney/volunteer teams. States can obtain advice and assistance on program development from the National Court Appointed Special Advocate Association and from statewide CASA organizations in many States.

Regardless of the program model adopted, the involvement of a trained volunteer can provide an important additional source of detailed information about the child for attorneys, caseworkers, and, ultimately, for the court. Independent volunteer advocacy, in combination with competent legal counsel, provides an opportunity for meaningful community involvement on behalf of abused and neglected children in the courts.

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APPENDIX

APPENDIX
Organizational Resources

Adoption Exchange Association
Dr. Dixie Davis
820 South Monaco #263
Denver, CO 80224
Phone: 303-755-2806

American Academy of Adoption Attorneys
P.O. Box 33053
Washington, DC 20033-0053
Phone: 202-832-2222
Web: www.adoptionattorneys.com

American Adoption Congress
Jane Nast
1000 Connecticut Ave., NW, Suite 9
Washington, DC 20036
Phone: 202-483-3399
Fax: 973-267-3356
Web: www.american-adoption-cong.org

American Bar Association
Center on Children and the Law
740 15th Street, N.W.
Washington, DC 20005
Phone: 202-662-1720
Fax: 202-662-1755
Web: www.abanet.org/child/
E-mail:ctrchildlaw@abanet.org

American Humane Association
Children's Division
63 Inverness Drive East
Englewood, CO 80112-5117
Phone: 800-227-4645
Phone: 303-792-9900
Fax: 303-792-5333
Web: www.americanhumane.org
E-mail:children@americanhumane.org

American Public Human Services Association
(Formerly the American Public Welfare Association)
810 First Street, N.E., Suite 500
Washington, DC 20002-4267
Phone: 202-682-0100
Fax: 202-289-6555
Web: www.aphsa.org

Association of Family and Conciliation Courts Mediation Committee
Mediation and Investigative Services
Attn: Jan Shaw
P.O. Box 14169
Orange, CA 92863
Phone: 714-935-6459
Fax: 714-935-6545
E-mail:jshaw@superior.co.orange.ca.us

Center for Social Services Research
University of California, Berkeley
16 Haviland Hall
Berkeley, CA 94720-7400
Phone: 510-642-1899
Fax: 510-642-1895
Web: http://hav54.socwel.berkeley.edu/cssr
E-mail:cssr@uclink.berkeley.edu

Center for Law & Social Policy
1616 P Street, NW, Suite 150
Washington, DC 20036
Phone: 202-328-5140
Fax: 202-328-5195/5197
Web: www.clasp.org

Center for the Study of Social Policy
1250 Eye Street, NW, Suite 503
Washington, DC 20005
Phone: 202-371-1565
Fax: 202-371-1472
Web: www.cssp.org

Child Welfare League of America
440 First Street, N.W., 3rd Fl.
Washington, DC 20001
Phone: 202-638-2952
Fax: 202-638-4004
Web: www.cwla.org
E-mail:advocate@cwla.org

Child Welfare Institute
1349 W. Peachtree Street, NW, Suite 900
Atlanta, GA 30309
Phone: 404-876-1934
Fax: 404-876-7949
Web: www.gocwi.org

Children and Family Justice Center
Northwestern University Legal Clinic
357 East Chicago Avenue
Chicago, IL 60611-3069
Phone: 312-503-8576
Fax: 312-503-0953

Children's Defense Fund
Child Welfare and Mental Health Division
25 E Street, NW
Washington, DC 20001
Phone: 202-628-8787
Fax: 202-662-3510
Web: www.childrensdefense.org

Children's Rights, Inc.
404 Park Avenue South
New York, NY 10016
Phone: 212-683-2210
Fax: 212-683-4015

Florida State GAL Program
Patricia Badland
State Guardian Ad Litem Program
State Court Administrator's Office
Supreme Court Building
500 South Duvall Street
Tallahassee, FL 32399
Phone: 850-487-1414
Fax: 850-414-1505

Judge David L. Bazelon Center for Mental Health Law
1101 15th Street, N.W., Suite 1212
Washington, DC 20005-5002
Phone: 202-467-5730
Fax: 202-223-0409
TDD: 202-467-4232
Web: www.bazelon.org
E-mail:bazelon@nicom.com

Juvenile Law Center
Robert Schwartz, Director
801 Arch Street, Suite 610
Philadelphia, PA 19107
Phone: 215-625-0551
Fax: 215-625-9589
E-mail:rschwartz@jlc.org

Legal Options for Permanency
Dave Thomas Foundation for Adoption
P.O. Box 7164
Dublin, OH 43017
Phone: 614-764-8454

Memorial University of Newfoundland
School of Social Work, St. John's College
Family-Group Listserv
Gale Burford, Ph.D.
Phone: 709-737-8161/8165
Fax: 709-737-2408

National Adoption Information Clearinghouse
P.O. Box 1182
Washington, DC 20013-1182
Phone: 888-251-0075
Phone: 703-352-3488
Fax: 703-385-3206
Web: www.calib.com/naic

National Association of Child Advocates
1522 K Street, N.W., Suite 600
Washington, DC 20005
Phone: 202-289-0777
Fax: 202-289-0776
Web: www.childadvocacy.org
E-mail:naca@childadvocacy.org

National Association of Counsel for Children
Imhoff Pavilion
1825 Marion Street, Suite 340
Denver, CO 80218
Phone: 888-828-6222
Phone: 303-864-5320
Fax: 303-864-5351
Web: www.nacchildlaw.org
E-mail:Advocate@NACChildlaw.org

National Association of Foster Care Reviewers
Two Midtown Plaza
1349 W. Peachtree St., NE, Ste. 900
Atlanta, GA 30309-2956
Phone: 404-876-3393

National Center for Juvenile Justice
710 Fifth Avenue, 3rd Fl.
Pittsburgh, PA 15219-3000
Phone: 412-227-6950
Fax: 412-227-6955
Web: www.ncjj.org
E-mail:ncjj@nauticom.net

National Center for Prosecution of Child Abuse
99 Canal Center Plaza, Suite 510
Alexandria, VA 22314
Phone: 703-739-0321
Fax: 703-836-3195
Web: www.ndaa-apri.org

National Center for State Courts
300 Newport Avenue
Williamsburg, VA 23187
Phone: 800-877-1233
Phone: 757-253-2000
Fax: 757-220-0449
Web: www.ncsc.dni.us/
E-mail:gflango@athena.ncsc.dni.us

National Center for Youth Law
114 Sansome Street, Suite 900
San Francisco, CA 94104-3820
Phone: 415-543-3307
Fax: 415-956-9024
Web: www.youthlaw.org
E-mail:martha@youthlaw.org

National Child Welfare Resource Center for Organizational Improvement
Edmund S. Muskie School of Public Service
University of Southern Maine
One Post Office Square, 400 Congress Street
P.O. Box 15010
Portland, ME 04112
Phone: 800-435-7543
Phone: 207-780-5810
Fax: 207-780-5817
Web: www.muskie.usm.maine.edu/helpkids
E-mail:patn@usm.maine.edu

National Clearinghouse on Child Abuse and Neglect Information
330 C Street, S.W.
Washington, DC 20447
Phone: 800-394-3366
Phone: 703-385-7565
Fax: 703-385-3206
Web: www.calib.com/nccanch
E-mail:nccanch@calib.com

National Conference of Commissioners on Uniform State Laws (NCCUSL)
211 E. Ontario Street, Suite 1300
Chicago, IL 60611
Phone: 312-915-0195
Fax: 312-915-0187
E-mail: nccusl@nccusl.org

National Conference of State Legislatures
444 North Capitol Street, NW
Suite 515
Washington, DC 20001
Phone: 202-624-5400
Fax: 202-737-1069
Web: www.ncsl.org
E-mail: Sheri.Steisel@NCSL.ORG

National Council for Adoption
1930 17th Street, N.W.
Washington, DC 20009
Phone: 202-328-1200
Fax: 202-332-0935
Web: www.ncfa-usa.org
E-mail:ncfadc@ibm.net

National Council of Juvenile and Family Court Judges
Permanency Planning for Children Department
P.O. Box 8970
Reno, NV 89507
Phone: 702-327-5300
Fax: 702-327-5306
E-mail: ppp@pppncjfcj.org

National Court Appointed Special Advocate Association
100 West Harrison, Suite 500
North Tower
Seattle, WA 98119
Phone: 800-628-3233
Web: www.nationalcasa.org/

National Indian Child Welfare Association
3611 Southwest Hood Street, Suite 201
Portland, OR 97201
Phone: 503-222-4044
Fax: 503-222-4007
Web: www.nicwa.org
E-mail:info@nicwa.org

National Legal Aid and Defender Association
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National Resource Center for Family Centered Practice
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National Resource Center for Permanency Planning
Hunter College School of Social Work
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North American Council on Adoptable Children
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North Carolina State Guardian Ad Litem Program
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